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No. 107

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

THOMAS MILNER HARRISON,
Plaintiff-in-Error,

vs.

J. A. MAGOON, F. B. McSTOCKER, DOROTHEA EMERSON, L. C. ABLES, T. E. COWART, J. H. KIRKPATRICK, A. E. POWTER, J. WOLFENDEN and GEORGE D. MOORE,
Defendants-in-Error.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR THE PLAINTIFF-IN-ERROR.

W. R. CASTLE,
D. L. WITHINGTON,
A. G. M. ROBERTSON,
For the Plaintiff-in-Error.

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Defendants-in-Error.

BRIEF FOR THE PLAINTIFF-IN-ERROR.

STATEMENT OF THE CASE.

THE FACTS.

The defendants, Magoon, McStocker, Emerson, Ables, Cowart, Kirkpatrick, Powter and Moore, by an agreement dated April 10th, 1897, (Tr. p. 34 and Tr. p. 156, Ex. A) formed a partnership at Honolulu with a capital of $105,000, "in the business of administering the formulas known as the Hagey Gold Cure, and in the establishment and disposition of Institutes for the purpose of administering said formulas." The business was to be carried on in "the Islands of the Pacific and Indian Oceans, and the continent of Africa, exclusive of the Hawaiian Islands."

The partnership was for five years. The profits, expenses, and losses were to be divided between the partners in proportion to the capital stock contributed by each. "Full and correct" account books were to be kept, open to the inspection of the partners at all times and full accounts of the profits, receipts, disbursements, or *"losses by them or any of them sustained,"* were to be rendered to each of the partners once a month, or oftener. Cowart, Ables and Kirkpatrick were to have charge of the business throughout the term of the partnership, as manager, secretary-treasurer and auditor, respectively, each at a monthly salary of $200.00. None of the partners were to "give or endorse any note, or create any liability on behalf of the Company," but there was to be "a fund necessary for the establishment and maintenance of the Institutes in the Territory before referred to." It was to be placed in the hands of the three partners who were to conduct the business, and the members of the partnership were not to be "bound for any debts and obligations incurred otherwise."

At the end of the partnership accounts were to be adjusted and "every stock and stocks" and the "gains and increases," whether "in money, *goods, wares, fixtures,* debts or otherwise," were to be divided between them.

McStocker also gave Ables his power of attorney to represent him, "in all matters connected with" the partnership, "and for that purpose to establish Institutes and to sell the medicines" prepared according to the "formulas" belonging to the partnership, and "to sell and dispose of the said formulas," and "to do and perform all other acts and things that may be necessary and proper in the prosecuting of the business" of the partnership. Giving to Ables full power "to do all things in the business as he could do if personally present." (Tr. p. 158, Ex. B., Tr. p. 40.) Magoon and Emerson also gave a power of attorney to Cowart and Kirkpatrick in precisely the same language as that given by McStocker to Ables (Tr. p. 168, Ex. J, and Tr. p. 83). Ables knew of this power of attorney. (Tr. p. 45 and Tr. p. 196, Ex. E.)

The partners in charge of the business went, in pursuance of the agreement, to Auckland, New Zealand, where they met the defendant Moore, who had preceded them (Tr. p. 34), and who afterwards took part in the consultations of the partners and in the business. (Tr. p. 39.) They opened an Institute (Tr. pp. 40-1) and prior to Aug. 31st, 1897, (Tr. p. 59 and Tr. 161, Ex. D, and Tr. pp. 193-4-5, Ex. 3) made a written agreement, (Tr. pp. 59, 60, and 165, Ex. H,) by which the original partners formed a sub-partnership with J. Wolfenden to carry on the business elsewhere than in Africa. After this they formed another sub-partnership at Auckland (Tr. p. 193, Ex. 3, and Tr. p. 198, Ex. 5, Tr. p. 200, Ex. 7, and Tr. p. 170, Ex. L,) by which the new sub-partners were to be "managing directors," and "managing partners," were to furnish money "to purchase a house and lot, furniture and etc.," and were to be guaranteed 10% on their investment.

Prior to September 23rd, 1897, the partners remaining in Honolulu were aware of the latter sub-partnership made by the partners in New Zealand, as Magoon in his letter of that date (Tr. p. 200, Ex. 7,) refers to the "document" that had been sent them, and by other letters of the same date, (Tr. p. 198, Ex. 5, and Tr. p. 199, Ex. 6,) explains the purport of the document. Apparently the partners at Honolulu had acquiesced in the sub-partnership with Wolfenden; (Tr. p. 84, and Tr. pp. 198-9-200, Ex. 5, 6 and 7, and Tr. p. 161, Ex. D, Tr. p. 170, Ex. K, Tr. p. 195, Ex. 3,) but objection was made to the New Zealand agreement because of the guarantee of 10% profit. (Tr. pp. 198, Ex. 5, 199, Ex. 6, and 200, Ex. 7.)

During September and October, 1897, the partners at Auckland (Tr. p. 169, Ex. K, Tr. p. 170, Ex. L, and Tr. pp. 62, 70-1), "had a deal on foot to form a Company for Sydney," by which they sold "to a local syndicate" a half interest for £12,500, which was afterward modified by selling to "two gentlemen" a "one-half interest in the Pacific and Indian Oceans." From this last "deal" the partnership to which Wolfenden belonged received £5000 (Tr. pp. 70-71).

About September 16th, 1897, the plaintiff and the defendants made an agreement (Tr. p. 98 and Tr. 178, Ex. O,) by which a sub-partnership was formed to carry on business in Tasmania. It was made between "The African, Pacific and Indian Hagey Company" and Alfred Edward Gilmore and the plaintiff, and stated that "whereas the said parties hereto propose to enter into partnership: * * * Now these presents witnesseth," &c. It recited that the plaintiff had paid £2000 for a two-fifths interest in the "partnership business" and clause 4 provided: "That if at the expiration of a period of six months from the date of the departure of the said Gilmore and the said Harrison from New Zealand to Tasmania the said Gilmore or the said Harrison is not satisfied with the condition of the said partnership business in Tasmania, the said Company will give the said Gilmore or the said Harrison stock of the market value equal to the amount of the £2250 * * * in exchange for the portion of said £2250 taken by him." It was signed in the partnership name by Wolfenden and the managing partners of the original Hagey Company then in New Zealand and by Gilmore and the plaintiff.

This agreement was afterwards slightly altered in lead pencil and then, after putting the words "taken by him" in clause 4 after the word "amount," was re-typewritten and again executed by the same parties in the same way on September 21st, 1897. (Tr. p. 180, Ex. P.)

The consideration, paid by the plaintiff and set forth in the agreement as £2000, was the conveyance to Ables (Tr. 182, Ex. Q, and Tr. pp. 98-9,) of about 6000 sheep with increase and a sheep run. Five hundred of the sheep were held by the plaintiff merely as a pledge to secure the payment of certain indebtedness (Tr. p. 144).

At the time the first agreement was signed by him, the plaintiff had neither seen (Tr. p. 98) the Articles of Association of the original Hagey Company (Tr. p. 156, Ex. A), the agreement admitting Wolfenden to a sub-partnership (Tr. p. 165, Ex. H), nor the powers-of-attorney (Tr. p. 158, Ex. B, and Tr. p. 168, Ex. J,) under which the three managing partners

of the Hagey Company in New Zealand had made the agreement with Wolfenden or the agreement with himself. After he saw the partnership articles and powers-of-attorney he "wanted some changes made" (Tr. p. 98). He arranged to have the pledged sheep conveyed to Ables and the indebtedness they secured released and in consideration thereof the agreement made by the plaintiff was again changed and finally executed on October 1st, 1897 (Tr. pp. 99-100, Tr. pp. 159, 160-1, Ex. C). Upon this last agreement the present action is brought.

The principal changes made in the agreements in consideration of the conveyance of the pledged sheep and because the plaintiff had seen the powers-of-attorney and Articles of Partnership of the Hagey Company were:

1. That the last agreement set out the partners in the original Hagey Company by name, and instead of providing merely that "the said parties hereto propose to enter into partnership," there was inserted after, "Now these presents Witnesseth," the following clause: *"For and in consideration of the covenants, agreements and payments hereinafter named the parties of the first part for themselves individually and the said Company collectively do hereby constitute and accept the said parties of the second part as partners as hereinafter stated."*

2. The new agreement gave the right to rescind and receive the stock of the market value of £2000 "at or before the expiration of a period of six months," instead of "at the expiration of a period of six months."

3. The new agreement was executed by each of the partners—either personally or by his attorney—individually.

The partners at Auckland when making these agreements represented to the plaintiff that their original partnership agreements made it necessary for them to keep on hand a fund to meet all liabilities they incurred in the business; and consequently they would hold stock of the value of £2000 during the option given to him (Tr. pp. 121-2).

On October 1st, 1897, Cowart wrote Magoon (Tr. pp. 85-91, and Tr. p. 170, Ex. L), "We sold ½ interest in Tasmania last week for 8000 sheep and £500. The parties could not raise

£500 after agreeing to but paid £250 and took ½ less £250. The sheep and lease of the land, 24,000 acres, was valued at £2000. We hope to sell the sheep in a short time. * * * Ables and Col. Moore have not and will not sign any papers (Ables did sign the papers for Tasmania)."

Under date of October 1st, 1897, Ables wrote to McStocker enclosing a trial balance with an item for Territory of £250 (Tr. pp. 193-4-5, Ex. 3). By a memorandum dated September 30th, 1897, annexed to his letter of October 2nd, 1897, he again wrote him: "The £250 is payment received on account of sale of Tasmania. £100 of this is to be put into the funds towards defraying expenses of parties going there. The sale of Tasmania was for 9-20 of the Territory. We get this amount of money and about six thousand sheep which are about 270 miles from Auckland and of uncertain value. On October 2nd, 1897, he wrote: "At the last moment Col. Moore has decided to go to Honolulu and Texas. He will put things to you as they are." (Tr. pp. 48-77-81, and Tr. p. 161, Ex. D, and Tr. p. 194, Ex. 3.) Moore left Auckland about October 2nd, 1897, (returning before December 6, 1897,), (Tr. pp. 94-5 and Tr. p. 161, Ex. D, and Tr. p. 104, Ex. 3), and after, or at the time of, the receipt by Magoon and McStocker of the three last mentioned letters, he arrived at Honolulu and saw the partners living there (Tr. pp. 86, 93-4). From things the partners at Honolulu learned at and subsequent to Moore's visit they concluded that Cowart and Kirkpatrick were doing wrong and that Ables and Moore were in the right (Tr. p. 93). The only matters the partners at Honolulu expressed dissatisfaction with in their letters, which are in evidence, to those at Auckland, were the guarantee of 10% on their investment to their sub-partners at Auckland, (Tr. pp. 198-9, 200, Ex. 5, 6, and 7), the making of the sub-partnership with Wolfenden, and the taking "in payment of sheep or lands" for territory (Tr. p. 203, Ex. 8). They did not object to the last two arrangements until months after they knew of them. All these matters were known to them at the time of Moore's visit. The only matters that the letters in evidence informed them of after Moore's visit, that they had

not known before, were the payment to the partnership of £5000 under the "deal" to form a company for Sydney, and the payment of the 18% dividend, concerning neither of which do they make any complaint (Tr. pp. 86, 93-4, and Tr. p. 170, Ex. L, and p. 169, Ex. K).

Mrs. Emerson says (Tr. p. 92): "As soon as our suspicions were aroused, * * * we did everything in our power to stop our power-of-attorney." Magoon and Emerson first endeavored to stop their power-of-attorney and showed they had entirely lost confidence in Cowart and Kirkpatrick when they wrote to Dexter on Oct. 21st, 1897, (Tr. p. 206, Ex. 10 and 11). This was subsequent to Moore's visit as the steamer time from Auckland to Honolulu is twelve days and Mrs. Emerson says: "We didn't altogether believe what Moore stated there. It was subsequent facts that made us think that he and Mr. Ables were right and Cowart and Kirkpatrick were in the wrong." (Tr. p. 93.) What these "subsequent facts" were does not appear from the evidence, but they must have been learned from letters received at Honolulu about the time of Moore's visit.

On October 30th, 1897, a dividend of 18% on the capital stock of the partnership, to which Wolfenden belonged, was paid from the general funds, into which the money raised by the sales of the interests in Sydney and Tasmania had gone; (Tr. pp. 45-6, 70-1, 78, and Tr. pp. 193-4-5, Ex. 3; Tr. p. 161, Ex. D; Tr. p. 170, Ex. 1; Tr. p. 169, Ex. K) and the partners at Honolulu when they received the dividend knew how the fund had been made up (Tr. pp. 48-9, 50, 56, Tr. p. 162, Ex. E, and Tr. p. 169, Ex. K), and shortly afterwards received a trial balance showing its items (Tr. pp. 79, 93-4, Tr. p. 196, Ex. 4, and Tr. p. 178, Ex. N).

When the sheep and run were conveyed, it was represented to the plaintiff, that Ables took them for his interest in the original partnership (Tr. p. 99); and that he intended to keep them for his own use (Tr. pp. 120, 132). They had cost the plaintiff about £1800 within ten months prior to the conveyance (Tr. pp. 143-4-5) to Ables; they were 270 miles from Auckland; not more than four or five people competent to purchase

them had seen or knew much about them (Tr. p. 102), and at that time of year the sheep could not be rounded up to permit prospective purchasers to estimate their value, nor could they then, in plaintiff's opinion, be properly placed on sale (Tr. pp. 117-8). Yet immediately on getting them the defendants, without seeing them, sold them for £500 (Tr. pp. 66-7), "the price of the wool on their backs," as their former owner who bought them, remarked (Tr. p. 133).

On October 4th, 1897, the plaintiff started for Tasmania, but remained in Sydney, N. S. W.—about half way to Tasmania—until the medicines and instructions for carrying on the business were sent to him, they being forwarded from Auckland about October 12th, 1897 (Tr. p. 62, Tr. p. 168, Ex. I). When he received the instructions they showed the business to be so different from what it had been represented (Tr. pp. 100-1, 124-5-6-7, and Tr. p. 184, Ex. S), that he returned to Auckland and asked to be released from the contract and to have the consideration returned to him (Tr. pp. 102-3, and 130-1-2). But when he got back he learned—as he had feared—(Tr. p. 102) that the sheep and run had been sold by the defendants before they sent him either the instructions or the medicines (Tr. pp. 66-7). The defendants promised to get him back the sheep and run and release him from the contract, but failed to do so (Tr. pp. 103 and 134-5); and he again started for Tasmania on January 17th, 1898, (Tr. p. 128), "to give the business a trial."

The plaintiff opened an Institute at Hobart during February, 1898, but the business proved unsatisfactory to him (Tr. pp. 104-5-6-7 and 135-139), and he set out for Auckland. On March 10th, 1898, he met the defendants Kirkpatrick and Wolfenden at Sydney, N. S. W., notified them of his dissatisfaction and demanded stock of the market value of £2000 according to the agreement (Tr. pp. 107-8, 139 and 188, Ex. T). They gave him neither the stock nor its value, and he proceeded to Auckland. There he learned that all the defendants, except Cowart, who had personally signed the agreement with him, had left New Zealand, and he was unable to find where they

were, so he, forthwith, brought suit in the Supreme Court of New Zealand for £2000 damages for breach of contract (Tr. pp. 109-110). Cowart was served with the summons in New Zealand; and Ables—who had gone to Australia, and afterwards returned to Honolulu (Tr. p. 54, and Tr. p. 196, Ex. 4)—was served with the defendants Magoon, McStocker and Emerson at Honolulu on July 23rd, 1898, (Tr. pp. 58, 87, 147, 221 and 171, Ex. M). On the 13th of June, 1899, the plaintiff recovered judgment, against all the defendants but Wolfenden, in the Supreme Court of New Zealand (Tr. p. 110 and Tr. p. 189, Ex. U). He failed to collect anything on the judgment (Tr. p. 110) and, therefore, came to Honolulu and instituted this action in November, 1899, (Tr. p. 1). Prior to his arrival at Honolulu none of the defendants there had notified plaintiff that they repudiated the contract (Tr. p. 110), nor had the plaintiff known of the correspondence put in evidence between the defendants at Honolulu and Dexter or the defendants at Auckland (Tr. p. 111).

THE PLEADINGS.

This action was originally brought against the four defendants, Magoon, McStocker, Ables and Emerson, who were within the jurisdiction of the Hawaiian courts at that time (Tr. p. 2). The defendants demurred to the declaration on eight grounds (Tr. p. 7); and the Circuit Court sustained the demurrer (Tr. p. 8). The plaintiff took his exceptions to the Supreme Court of Hawaii (Tr. p. 10) where they were decided (13 Haw. 361 and Tr. p. 11).

Section 1222 of the Civil Laws of 1897 (Tr. p. 27) provided: "It shall be necessary to join as defendants in a civil action all joint * * * or joint and several obligors, * * * to contracts." It was argued by the plaintiff (Tr. p. 27), that this section only applied to such joint and several defendants as were within the jurisdiction of the court, and that the agreement sued upon being joint and several, it was not necessary to joint parties outside the jurisdiction as defendants. The court overruled the demurrer to the first count on

all points except the non-joinder of absent defendants; but held that the agreement was joint and several (13 Haw. 361 and Tr. p. 27) and said: "This is the construction strongly contended for by the plaintiff himself."

THE TRIALS.

The action was tried and the plaintiff obtained a verdict. This verdict was set aside upon exceptions taken to the Supreme Court of Hawaii, because the court—"Giving some definitions on the subject of 'the scope of the partnership business,' and also instructions as to the ordinary powers of partners * * * submitted to the jury the question of whether or not the execution of the contract was within such scope and, therefore, authorized" (14 Haw. 424, referred to in Tr. p. 232).

The plaintiff applied for a rehearing on the ground (14 Haw. 424 referred to in Tr. p. 232), "that the defendants, L. C. Ables, T. E. Cowart and J. H. Kirkpatrick, who personally executed the agreement upon which this action has been brought, stand in a different position from those defendants who executed said agreement through attorneys; that the reasons assigned by the court for ordering a new trial of said cause do not, and cannot, apply to the defendants above named and that as to them the verdict of the jury should not have been reversed."

The court held that the "demand relied upon was shown to have been made upon Kirkpatrick alone," that, "notice to Kirkpatrick could affect the other defendants only upon the theory of joint liability;" and that, "recovery must be either against all who are jointly liable or against each of the persons separately upon his several liability and in the latter case notice to one would not, by mere operation of law, be notice to any of the others." A judgment against Kirkpatrick or Cowart would have been a mere empty form, as they had not been served in the action and, by Section 1222 of the Civil Laws of 1897, no execution could issue against their sole property, if any were within the jurisdiction of the court.

Consequently the court denied the motion for rehearing, overlooking the fact that the summons in the action brought in New

Zealand had been served on the defendant Ables, as soon as he could be found.

The action was again tried in October, 1903, and, when the plaintiff rested, the court, on November 9th, 1903, (Tr. pp. 148, 207), granted the motion for non-suit made on behalf of each of four defendants; as the court said it had, "determined that the plaintiff cannot maintain this action as against the defendants, who have been served or who have appeared in this action." (Tr. p. 148.)

As the other defendants had neither been served nor appeared, and, consequently, by Civil Laws 1897, Sec. 1222, (Rev. Laws 1741,) no execution could issue against the sole property of any of them, the action was dismissed as to them and the jury discharged. (Tr. pp. 148, 220.)

On November 14, 1903, the plaintiff filed a motion for a new trial (Tr. p. 207) on four grounds: (1) The improper exclusion, (2) and admission of evidence; (3) the granting of the non-suit and (4) the discharge of the jury; all of which proceedings had been objected and excepted to. The motion came on for hearing on December 31st, 1903; and was continued from time to time until January 16th, 1904, (Tr. p. 220); when the court dismissed the motion, without considering its merits on the grounds: (1) That a motion for a new trial was improper in the case of a decision and judgment of non-suit and (2) that no notice of a motion for a new trial was given by plaintiff at the time of the decision and judgment of non-suit." (Tr. pp. 208, 221.) On November 12th, 1903, judgment had been signed and on December 31st, 1903, the court had given the plaintiff until twenty days after the disposition of the motion for new trial in which to present his Bill of Exceptions (Tr. p. 208). On January 20th, 1904, a stipulation was filed giving the plaintiff until twenty days after the transcript was completed to present his Bill of Exceptions, (Tr. p. 209,) if the defendants had not then the right to insist that the time for filing the bill had already expired (Tr. p. 209). The transcript was completed July 25th, 1904, (Tr. pj. 149);

and the Bill of Exceptions presented for allowance August 6th, 1904, (Tr. p. 222).

On September 2nd, 1904, (Tr. p. 222,) the defendants moved to strike the cause from the Calendar of the Supreme Court of Hawaii on the grounds that: (1) the Bill of Exceptions was filed too late, (2) that no exception lay to an order dismissing the motion for new trial, (3) that no motion for new trial lies after non-suit, and (4) that no notice of motion for new trial was given when the non-suit was granted.

The matter was argued October 3rd, 1904, and on October 31st, 1904, the court decided (16 Haw. 170: Tr. pp. 223-230): that the Hawaiian Statute (Laws of 1903, Art. 32, Sec. 18), which required the Bill of Exceptions to be presented "within twenty days after final judgment, or such further time as may be allowed by the judge," made it necessary to have an extension of time "allowed before the expiration of the twenty days allowed by statute or the extended time previously allowed by the judge under the statute." But the court held it unnecessary to decide whether the date of final judgment was November 12th, 1903, when judgment was signed, or the time when the motion for new trial was dismissed, as the statute allowed exceptions to be taken in any "proceeding," and consequently, the exception to the dismissal of the motion for a new trial might be heard. It held that under the statute an exception did lie to the dismissal of a motion for new trial as distinguished from an order overruling it, and that such a motion might properly be made after judgment of non-suit, although no notice of it had been given when the non-suit was ordered.

The exceptions were argued and the court, on December 19th, 1904, decided (Tr. pp. 231-236, 16 Haw. 332), that the filing of the motion for new trial did not keep the judgment from becoming final, for purposes of appeal, until it was disposed of, and that, consequently, the exceptions taken during the trial were not presented within the time required by statute: that the only exception the court would consider was that, "taken

to the dismissal of the motion for a new trial." That although a motion for new trial might be based generally on errors of law occurring at the trial, provided a specification of errors is not required by the trial judge, as the rulings are generally fresh in his mind; yet the appellate court could not consider the exceptions to the denial of such a motion, unless the motion showed what errors had been specifically passed upon when it was heard. Consequently, as the only ground of error specifically alleged in the motion was, that the non-suit should not have been granted on the evidence, that was the only ground the court would consider. (This decision was made although the trial judge had refused to pass upon any errors committed at the trial, whether specifically alleged or not.) The court reaffirmed its ruling, that the agreement sued on was not within the scope of the business of the partnership formed at Honolulu, and held there was no evidence to show, that Magoon, McStocker or Emerson had afterwards ratified that agreement. It reconsidered its former ruling, that the agreement was joint and several, and held, that in declaring against all the defendants the plaintiff, "took the chances of being able to show that they had all executed the agreement, and was liable to 'be non-suited at the trial if he fail in proving a joint contract' (1 Ch. on Pl. 51), unless this was an agreement binding upon the defendants severally as well as jointly;" and that, "in order to constitute a separate liability only, in those cases where several persons contract together for the performance of a particular act, the intention must be made plainly apparent by express words." The court, therefore, held that the agreement was incomplete unless all the parties to it signed—"on the theory of an implied term that all are severally bound in case only of all signing"—and that as Magoon, McStocker and Emerson had not signed there was no agreement; and the exceptions were overruled.

On January 24th, 1905, the plaintiff filed a petition for rehearing (Tr. pp. 237-261); because Section 1222 of the Civil Laws of 1897 made it necessary to join all joint, or joint and

several defendants, and consequently, it must have been the intention of the legislature in such cases, either to permit judgments to be recovered against any or all of the defendants, as justice might require, or to oblige the plaintiff to recover against all the defendants or be non-suited. As the necessity of a plaintiff recovering against all the defendants—even though they were alleged to be merely joint—had been obviated by statute nearly everywhere, and as it would be plainly unjust to oblige him to recover against all joint and several defendants, thus practically making all joint and several contracts joint only, the plaintiff contended he should be allowed to recover against such of the defendants as were liable, and that it was unquestionably the law where one or more partners made an agreement, in excess of their authority, and failed to bind the firm, that such partners should alone remain liable on the contract for damages for breach thereof. He also asked a rehearing on the further ground, that as the Hawaiian statute allowing amendments (Tr. p. 245, Session Laws 1903 p. 366) was extremely liberal and permitted them to be made after judgment, he should be allowed to amend his declaration by adding a count for a quantum valebant, as he had been taken by surprise, in that he could not have anticipated that the court would reconsider its former ruling that the contract was joint and several, and not permit him to recover against any of the defendants if he could not recover against all.

On March 6th, 1905, the court denied the petition for rehearing (16 Haw. 485, Tr. pp. 262-264), because it had based its former decision on the ground that the contract sued on was incomplete, and not because it was joint and not several. The court also held, that it could not allow the proposed amendment as no error was found in the judgment below.

THE ERRORS.

The errors relied on by the plaintiff-in-error are (Tr. pp. 265-6-7):

1. It was erroneous to sustain the granting of the non-suit

as to the four defendants, Magoon, McStocker, Emerson and Ables, (Assignment of Errors, 2, 4, 5, Tr. p. 266).

2. It was erroneous to sustain the granting of the non-suit as to Ables because it was granted as to Magoon, McStocker and Emerson, (Assignment of Errors, 3, 6, Tr. p. 266).

3. It was erroneous to sustain the dismissal of the action as to the defendants not non-suited, (Assignment of Errors, 2, 6, Tr. p. 266).

4. It was erroneous to sustain the dismissal of the motion for new trial without considering its merits, (Assignment of Errors, 1, Tr. p. 266).

5. It was erroneous to refuse to consider the exceptions taken at the trial or any of the exceptions but that taken to the dismissal of the motion for new trial, (Assignment of Errors, 7, Tr. p. 266).

6. As the facts alleged and proved constituted a cause of action against the defendants, or some of them, if the pleadings as they now stand would not sustain a judgment, it was erroneous not to grant a new trial with leave to the plaintiff to amend, as he was subject to surprise, since he could not anticipate that the law of the case would be changed and the agreement held not joint and several and, therefore, incomplete and ineffective, (Assignment of Errors, 9, Tr. p. 267).

ARGUMENT.

I.

IT IS A QUESTION FOR THE JURY UNDER PROPER INSTRUCTION TO DETERMINE WHETHER THE AGREEMENT SUED ON IS WITHIN THE SCOPE OF THE PARTNERSHIP AS CONSTRUED AND ACTED UPON BY THE PARTIES.

The argument under this head is presented without sub-divisions, but the grounds may well be assigned under four heads:

(a) The agreement made at Honolulu contemplated a business of an unusual character, therefore, the managing partners required unusual powers.

(b) For the purpose of executing unusual powers, a fund was provided and put in the hands of the managing partners thousands of miles away from the other partners, which fund was exempt from the other limitations contained in the agreement. Therefore, under the peculiar language of the instrument and the powers-of-attorney given to still further effectuate it, unusual powers were apparently intended to be given.

(c) The agreement being silent as to the means to be adopted to carry out these unusual purposes and no limitations being put upon these means it is a question of fact what means were to be adopted, and this is to be found by the jury under proper instructions on all the evidence in the case.

(d) The construction put upon the instrument by the parties, the giving of the powers-of-attorney, the establishment of other institutes through the medium of copartnership are all evidence tending to show that the contract sued on is within the unusual powers contemplated by the parties, and therefore the question should have been submitted to the jury, whether in consideration of all these circumstances, giving each its due weight, the agreement is one which the plaintiff had reason to

believe was authorized by all the members of the partnership.

The law is well set forth in a case in this court which in principle covers all these grounds.

"In *Irwin v. Willer*, 110 U. S. 499, 505: 28 L. 225, Mr. Justice Matthews, speaking for the Court, said: 'The liability of one partner, for acts and contracts done and made by his copartners, without his actual knowledge or assent, is a question of agency. If the authority is denied by the actual agreement between the partners, with notice to the party who claims under it, there is no partnership obligation. If the contract of partnership is silent, or the party with whom the dealing has taken place has no notice of its limitations, *the authority for each transaction may be implied from the nature of the business according to the ordinary and usual course in which it is carried on by those engaged in it in the locality which is its seat, or as reasonably necessary or fit for its successful prosecution. If it cannot be found in that, it may still be inferred from the partnership itself, as personally carried on with the knowledge, actual or presumed, of the partners sought to be charged.' Again: 'What the nature of that business in each case is, what is necessary and proper to its successful prosecution, what is involved in the usual and ordinary course of its management by those engaged in it, at the place and time it is carried on are all questions of fact to be decided by the jury, from a consideration of all the circumstances which, singly and in combination, affect its character or determine its peculiarities, and from them all, giving to each its due weight, it is its province to ascertain and say whether the transaction in question is one which those dealing with the firm had reason to believe was authorized by all its members.* The difficulty and duty of drawing the inference suitable to each case from all its circumstances cannot be avoided or supplied by affixing or ascribing to the business some general name, and deducing from that, as a matter of law, the right of the public and the duties of the partners.'

"It is very clear that the articles of agreement between Ferry, White and Dowling did not create a partnership, each member of which had, under the settled rules of commercial law, and as between the firm and those dealing with it, authority to give negotiable paper in its name. * * *

"The difficulty in this case is that the jury were not permitted to determine, from a consideration of all the circumstances of the case, what, in view of the admitted nature of the business of F. H. White & Co., was necessary and proper to its successful operation, what was involved in the usual and ordinary course of its management by those engaged in it, or what should be inferred from the actual course and conduct of the partnership, so far as it was known, *or ought reasonably to have been known,* to the parties sought to be charged with liability. * * * It is sufficient to say that the issue as to whether the defendants were estopped to dispute the authority of Edward P. Ferry to make the notes in suit, in the name of F. H. White & Co., was one peculiar for the jury, under all the facts indicating the nature, necessities and course of the business of the firm, and under proper instructions from the court as to the legal principles by which they should be guided in determining the case."

Dowling v. National Exchange Bank of Boston, 145 U. S. 512: 36 L. 795, 797.

"Evidence of such apparent authority is not restricted to proof of general custom, to proof that the agent had previously performed similar acts to the knowledge of the principal. The nature of the business usage, not amounting to a general custom, and the fact, if it exists, that the principal is at a great distance, and the agent apparently entirely in charge of the business, may, in proper cases, be, among other things, elements for consideration."

Johnston v. Milwaukee & W. Inv. Co., 49 Neb. 68: 68 N. W. 383.

The partners sent to New Zealand were going to a country, many thousands of miles from those at Honolulu, without tele-

graphic or other means of rapid communication. They were to establish and sell a business, uncommon and almost without precedent, among a foreign people, and to contend with customs or prejudices of which those at Honolulu knew nothing. Naturally they were given the broadest discretion in establishing and disposing of such a business, especially with regard to getting people of local influence to join in its development, or to purchase from them. The partners at Honolulu fearing that the ordinary authority under the articles of partnership was insufficient, gave the managing partners in New Zealand powers-of-attorney to supplement their authority.

The partnership articles (Tr. p. 156, Ex. A) do not prescribe the methods to be followed by Cowart, Kirkpatrick and Ables in "the establishment and disposition of Institutes for the purpose of administering" the formulas known as the "Hagey Gold Cure." The powers-of-attorney state that they have authority, "to sell and dispose of the said formulas in the districts where they may be operating," and "to sell the medicines compounded under the formulas." The general authority given in the Articles was therefore wide enough to include the specific authority stated in the powers.

The authority to make sub-partnerships *is not denied* by "the agreement between the partners" and the "contract of partnership is silent," in that respect. A fund was provided for the "establishment and maintenance of the Institutes" and placed under the control of the partners making the contract. The capital of the concern was $105,000, which is undisposed of except for the purposes of this fund. The right of the partners to incur liability in connection with the fund is not only apparent on the principle, *"expressio unius est exclusio alterius;* but is especially excepted from the clause that forbids the creation of liability, while the losses were to be borne "in accordance with the proportional share, that each may hold;" and the managing partners were to render accounts once a month or oftener if necessary, "of all * * * the losses by them or any of them sustained."

The following cases are cited in support of the principles of construction just applied:

Haldane v. United States, 69 Fed. 819; *Evanston v. Gunn*, 99 U. S. 665: 25 L. 306; *United States v. Macon County*, 99 U. S. 582: 25 L. 331; *Thomas v. West Jersey R. R. Co.*, 101 U. S. 71: 25 L. 950.

The prohibition that "none of them will give or endorse any note, or create any liability on behalf of the company," referred to the creating of liabilities in the nature of promissory notes and was limited by the following provisions concerning the fund.

The principle ejusdem generis is supported by the following cases:

Given v. Hilton, 95 U. S. 591: 24 L. 458; *Andrews v. Schoppe*, 84 Me. 170: 24 Atl. 805; *Benton v. Benton*, 63 N. H. 289; 56 Am. Rep. 512; *Boon v. Aetna Ins. Co.*, 12 Blatchf. (U. S.) 24: 3 Fed. Cas. Case 1639; *Kendall v. Almy*, 2 Sumn. (U. S.) 278: 14 Fed. Case 7690; *South v. Maryland*, 18 How. (U. S.) 396: 15 L. 433.

Even if the agreement "did not create a partnership the managing members of which, under the settled rules of a commercial law" had authority to make sub-partnerships, the authority for such transactions may, "be inferred from the actual though exceptional course and conduct of the business of the partnership itself, as personally carried on with the knowledge, actual or presumed, of the partners sought to be charged." The business was so unusual that there appears no evidence as to the "ordinary course in which it is carried on by those engaged in it in the locality which is its seat."

The partners in New Zealand—before making the agreement sued on—attempted "the establishment and disposition of Institutes," and "to sell the medicines" or formulas only by forming sub-partnerships. They formed the first of these prior to September, 1897, and the partners at Honolulu knew of the second sub-partnership—which involved the partners at Honolulu in a guarantee of 10% on the investment of their sub-partners—before the agreement sued on was executed (Tr.

p. 200, Ex. 7). The articles of partnership of the original Hagey Co. provided that full accounts of the business should be rendered once a month, or oftener, and the plaintiff on seeing them had every reason to "presume" that the partners at Honolulu, now sought to be charged, knew of this method of conducting the business, and had acquiesced therein; since, at that time, they had taken no steps to warn people, where the business was being conducted, that the partners there had made contracts in excess of their authority.

"One member of a partnership can not make such a contract as will involve the creation of another partnership between his own firm and other parties, so as to bind thereby his copartners, unless he has other authority than that which is incident to the mere relation of partners.

"But, in such case, for the purpose of showing authority to make such a contract, and the acquiescence of his partners therein, it is competent to prove that similar contracts had been repeatedly made by him before, which were ratified and executed by his copartners without objection; and letters written by the objecting parties, tending to show their acquiescence in such contracts, are also competent evidence for the same purpose."

Buckingham v. Hanna, 20 Ind. 110, citing *Jewett v. R. R.,* 10 Ind. 539.

When the partners at Honolulu had acquiesced in those at Auckland making an agreement of sub-partnership to pay 10% on the investment of their sub-partners, the plaintiff had reason to believe the partners at Auckland had authority to agree to return to him the value of what he paid them, if he were dissatisfied.

The Court should have ruled that the agreement was within the scope of the business, or that there was evidence to go to the jury on the question.

II.

IF THE AGREEMENT SUED ON WAS NOT WITHIN THE SCOPE OF THE BUSINESS OF THE PARTNERSHIP SUED, YET THERE WAS EVIDENCE THAT THE PARTNERS WHO EXECUTED IT BY ATTORNEY, AFTERWARDS RATIFIED IT.

(a) They ratified it when they received the 18% dividend.

As Magoon, McStocker and Mrs. Emerson "were all living" at Honolulu and "closely related," Magoon and McStocker "being in the same business," and Mrs. Emerson in Magoon's employ, Ables considered communication to one was the same as communication with all (Tr. p. 51, and Tr. p. 196, Ex. 4).

On October 1st and 2nd, 1897, the time the agreement was signed, Ables wrote McStocker, and Cowart wrote Magoon, that they had sold a fractional interest in Tasmania for cash, sheep and lands (Tr. p. 161, Ex. D, and Tr. p. 170, Ex. L); and Ables told McStocker that Moore was "going to Honolulu and Texas by *this* mail * * * to put ourselves right in the eyes of you" (Tr. p. 194, Ex. 3), and that: "He will put things to you as they are." The partners at Honolulu knew, when they received these letters, several sub-partnerships had been formed in New Zealand, and could not well expect the fractional interest would be sold without forming another. They knew they were parties to a guarantee of 10% profit to certain of their sub-partners in New Zealand (Tr. p. 200, Ex. 7, and Tr. p. 193, Ex. 3); and they, therefore, had reason to expect the agreement with the plaintiff might secure him. They knew Ables had signed the agreement concerning Tasmania, but that Moore had refused to sign it and probably had strong objections to it (Tr. p. 170, Ex. L); and they saw Moore and talked with him about the partnership when he arrived in Honolulu along with the letters telling them of the agreement. They knew that money received from the sale of the fractional interest had gone into the funds of the original company, and that more money would be realized when the sheep were sold (Tr. p. 161, Ex. D; Tr.

p. 170, Ex. L, and Tr. pp. 193-5, Ex. 3). When Moore arrived, or immediately thereafter, Magoon and Emerson wrote Dexter asking him to take steps to limit the authority of Cowart and Kirkpatrick (Tr. pp. 206-7, Ex. 10 and 11); but they made no effort to in any way repudiate what Cowart or Kirkpatrick had done; and when the 18% dividend arrived in the first part of November, 1897, the partners at Honolulu seem to have acquiesced in the situation, as they do not appear to have written to Auckland by return mail, since the steamers carrying the mails between Honolulu and Auckland sailed each way every four weeks, one leaving Honolulu a few days after the arrival of the Auckland mail. By the mail leaving Auckland four weeks after the dividend was sent (Tr. p. 196, Ex. 4), Ables wrote he was about to abandon the business, for McStocker and Magoon not to "hesitate to cancel" his power-of-attorney, that he would wait until they sued him or they heard from him again; and that they were to send letters "care of Steward of steamer," as they might not reach him. Magoon and Emerson then wrote to Dexter (Tr. p. 201, Ex. 8), although they knew "full well" he had refused to represent them—*in case Cowart and Kirkpatrick refused to buy out the partners at Honolulu*—to publish a notice that they were not authorized "in any capacity whatever" to represent them (Tr. p. 204, Ex. 9). They did not, however, attempt to repudiate what had been done, or to return the money they had received by reason of the transactions they objected to, while Dexter did nothing in the matter (Tr. pp. 110, 111), nor did they take any action.

The partners at Honolulu, therefore, ratified the agreement sued on when they received the 18% dividend out of the funds into which the proceeds of the sale had gone, without offering to return the consideration they received under that agreement, as they either then knew the material features of the agreement, or, well knowing the partners at Auckland had exceeded their authority, and having knowledge of the chief features of what had been done, they failed to inform themselves about it when given full opportunity to do so, since they were aware they could not keep the consideration, if they knew the exact terms

of the agreement, and not be bound by those terms. Magoon and Emerson say (Tr. p. 202, Ex. 8): "I do not know whether they have violated the agreement or not, or whether they have attempted to make me liable in any way; but I have an indefinite dread that they may do something in this connection prejudicial to my interest." Yet, although they knew of everything that caused this dread when Moore was at Honolulu in October, 1897, they cannot remember, either that he referred to the "Tasmania agreement or the sheep," or that they spoke to him about the matter. (Tr. pp. 86-93-4.)

"The rule is well settled that where a principal accepts the benefits of an unauthorized act of an agent with knowledge, actual or constructive, of all the material facts, he is deemed to have ratified the act and is bound thereby.

Harrison v. Magoon, 14 Haw. 424.

McGahan v. National Bank of Rondout, 156 U. S. 218: 39 L. 403.

"Where upon the face of the title papers, the purchaser has full means of acquiring complete knowledge of the title from the references therein made to the origin and consideration thereof, he will be deemed to have constructive notice thereof."

Oliver et al v. Piatt, 3 How. (U. S.) 333: 11 L. 622.

"The law imputes knowledge when opportunity and interest, combined with reasonable care, would necessarily impart it."

Woolensak v. Reiher, 115 U. S. 99: 29 L. 350.

"The assent of one of two partners to a contract made by the other partner for the junction of the firm with a third person in another partnership, may be inferred from circumstances: and such assent may be implied from the acts of one of the parties, the declarations of another, and the conduct of a third, taken together."

Wood v. Connell et als., 2 Wharton's Reports (Pa.) 542.

"Where a member of a firm engages the firm in another partnership, a ratification by the other partner may be presumed by his silence after he has knowledge of the fact."

Tabb v. Gist, 23 Fed. Case No. 13, 719: 6 Call. 279: 1 Brock 33: 38.

"Where a partner entered into an agreement for the firm outside of the scope of its business, it is not necessary in an action thereon, that a ratification be established by direct proof, but it may be inferred from the general course of dealing between the members of the firm."

Guthiel v. Gilmer, 27 Utah 496: 76 Pac. 628.

In *Winship v. Bank of United States,* 5 Pet. (U. S.) 529: 8 L. 216, it was left to the jury whether the fact that certain transactions were entered on the partnership books conclusively showed knowledge of the other partners, and therefore, ratification. The judges, "left the jury to draw their own conclusion as to the knowledge of the Binneys, of the entries in the partnership books, from the whole transaction."

"If a principal, after knowledge that his orders have been violated by his agent, receives merchandise purchased for him contrary to orders, and sells the same without signifying any intention of disavowing the acts of the agent, a ratification of the agent's acts may be inferred."

Bell v. Cunningham, 3 Pet. (U. S.) 69.

"Where bailiffs sent by the landlord to distrain for rent upon a certain farm exceeded their authority in taking beyond the limits of the farm cattle belonging to another person than the tenant, and the cattle were sold and the landlord received the proceeds, the landlord was held not liable in trover unless the jury should find that he ratified the acts of the bailiff with knowledge of the facts, or that he chose without enquiry to take the risk upon himself and adopt the whole of their acts."

Lewis v. Read, 13 M. & W. 834.

Other cases of ratification from implied notice are:

Bank of Monongahela Valley v. Weston, 159 N. Y. 201: 54 N. E. 41.

Nichols Shephard & Co. v. Shaffer, 63 Mich. 599: 30 N. W. 383.

Neimeyer Lumber Co. v. Moore, 55 Ark. 240: 17 S. W. 1028.

Stokes v. Mackay, 140 N. Y. 640.
Roger v. Kneeland, 10 Wend. (N. Y.) 218.
Garrett v. Carter, 42 Pa. St. 143.
Elkenberry v. Edwards, 67 Iowa 14: 24 N. W. 570.
United States Mortgage Co. v. Henderson, 111 Ind. 24: 12 N. E. 88.
Garden v. Warren, 52 Mich. 309: 17 N. W. 853.

(b) They Ratified it When They Received the Summons from New Zealand, and Failed to Repudiate the Contract and Return the Benefits Received Under it.

If the partners at Honolulu had not knowledge, actual or implied, of all the material facts concerning the agreement sued on, when they received the 18% dividend, they certainly acquired such knowledge when they were served, on July 23rd, 1898, with the summons in the action brought in New Zealand (Tr. pp. 58, 87, 147, 221 and 171, Ex. M); and when they then failed to notify the plaintiff that they repudiated the agreement and to offer him back the consideration and benefits they received thereunder, they ratified the contract (Tr. pp. 110 and 111). It was then their duty to, at least, tender back to him the portion of the £500 cash, realized from the sale of the sheep, that they each had received; as that £500, together with the £250 received under the agreement sued on, either went into the fund from which the dividend was paid or went towards paying the expenses of the business of the defendants, as partners. If £450, out of the £750 realized by them in pursuance of the agreement, had not been received by them when the dividend was paid, yet it was an asset of the partnership known both to the partners at Honolulu and those at Auckland at that time, and must have been considered in determining the amount of the dividend, and it was afterwards used, with the knowledge of all the partners for the benefit of the partnership business; and thus they all knowingly received the full benefit of it (Tr. pp. 44-5-6-7-8, 78-9 and 161, Ex. D; p. 162, Ex. E; p. 169, Ex. K; p. 170, Ex. L; p. 178, Ex. N; pp. 193-4-5, Ex. 3; p. 196, Ex. 4),

as all the partners would otherwise have been liable for the expenses defrayed by this £450.

"It is a general rule applicable to all persons and corporations, and is a dictate of plain honesty, that whoever, knowing the facts of the case, retains and uses money received by an agent for his account, cannot repudiate the contract on which it is received."

Mayor of Nashville v. Ray, 19 Wall. (U. S.) 468, 484: 22 L. 164, 171.

"If defendant meant to repudiate W's order made in his name, he should have distinctly notified the C's of such repudiation as soon as he could conveniently do so (or within a reasonable time) and should have promptly returned the bills of lading, which gave him the legal title to and control of the goods.

"The question whether defendant ratified and adopted the contract made by W., is for the jury, upon all the facts."

Cooper v. Schwartz, 40 Wis. 54.

Other cases on this point are:

Union Mining Co. v. Rocky Mountain National Bank, 96 U. S. (6 Otto) 640: 24 L. 648.

Rolling Mill v. St. Louis, &c., R. R. Co., 120 U. S. 260: 30 L. 641.

Pittsburg, &c., R. Co. v. Keokuk Bridge Co., 131 U. S. 381: 33 L. 160.

Wright v. Carson Water Co., 23 Nev. 49: 42 Pac. 196.

Perkins v. Booth, 71 Me. 94.

Even where the principals do not learn all the details of the unauthorized contract, made by their agent, until after action is brought, if they then fail to return money which has been received under the contract, by the agent who made it without authority, and expended by him on their behalf before they learned all the details, they are held to ratify the contract.

This principle is fully recognized in *Russ v. Hansen,* 119 Iowa 375: 93 N. W. 502.

"Plaintiff commenced an action of replevin to recover of the defendants certain cattle, the possession of which had been

acquired by defendants through an alleged unauthorized sale of the cattle to them by an agent of plaintiff. The defendants' answer was a general denial. After commencement of the action, but before trial, the plaintiff gained knowledge that it had received the benefit of a portion of the proceeds of the unauthorized sale, (the money having been paid out by the agent "in connection with the running of" plaintiff's ranch.) Held, that it should then have returned to the defendants so much of the proceeds of the sale as had been applied to its benefit, or tendered such return, and its failing so to do would be a ratification of the sale, which related back to its inception."

Johnston v. Milwaukee & Wyoming Inv. Co., 49 Neb. 68: 68 N. W. 383.

"Where an indebtedness was settled and receipted for in full by plaintiff's agent on acceptance of notes for a lesser amount and a mortgage securing the same, which notes and mortgage were turned over to plaintiff, who kept the same, and never tendered their return, though advised by defendant's answer, filed within three months thereafter, of the cancellation of the indebtedness, and their procurement by means thereof, no recovery could be had for the balance of such indebtedness nine months thereafter, though such cancellation was without authority, since the principal's act constituted ratification."

Fleishman v. Ver Does, 111 Iowa 322: 82 N. W. 757.

The same principle applies where the parties so ratifying are defendants, as well as where they are plaintiffs.

"A principal must disaffirm the unauthorized act of its agent within a reasonable time after such act comes to its knowledge, or it will be bound thereby.

"A principal sued upon an unauthorized contract made by its agent may, on the trial of the case, disaffirm the agent's act, if at that time such act is first brought to its knowledge. * * * And if it then desired to disaffirm that act of its cashier (the agent) it should on the trial amend its answer, * * * and return, or offer to return," the consideration, or its proceeds.

Farmers' & Merchants' Bank of Elk Creek v. Farmers' & Merchants' National Bank of Auburn, 49 Neb. 379: 68 N. W. 488.

And where one partner undertakes to introduce a stranger into the firm, without authority, if the other members of the firm acquiesce after knowing all the facts they will be bound.

"One partner cannot, without the consent of the others, introduce a stranger into the firm nor can he, without such consent, make the other partner a member of another firm, but such consent may be implied from the acquiescence and acts of the parties; and if such other partner is made acquainted with the facts, he ought to dissent from the arrangement, otherwise he will be bound by it."

Mason v. Connell, 1 Wharton's Reports (Pa.) 381.

In such a case notice, to one of the parties to the unauthorized agreement before that agreement was ratified, would be notice to firm if the agreement were afterwards ratified.

It has been repeatedly decided in the case at bar that: "Notice to and demand upon Kirkpatrick was sufficient notice to and demand upon all of the other members of the A. P. & I. H. Co., provided they all executed or subsequently ratified the Tasmania agreement."

Harrison v. Magoon, 14 Haw. 425: Idem 531-2.

This statement of the law is sustained by the decisions of this Court.

"A ratification by one, of the unauthorized act of another, respecting the property of the former, operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened."

Cook v. Tullis, 18 Wall. (U. S.) 332: 21 L. 933.
Pickering v. Lomax, 145 U. S. 310: 36 L. 716.

III.

THE PLAINTIFF IS ENTITLED TO HAVE ALL THE QUESTIONS AS TO WHETHER THE AGREEMENT WAS WITHIN THE SCOPE OF THE PARTNERSHIP BUSINESS AS CONDUCTED BY THE DEFENDANTS, OR WAS RATIFIED BY THE PARTNERS WHO EXECUTED BY ATTORNEY, LEFT TO THE JURY.

"Where evidence is 'capable of more than one construction' or of 'more than one inference, the jury alone is to determine the meaning to be conveyed, and the inference to be drawn from facts proved where more than one inference may be drawn reasonably.'—Perry, J., in *Smith v. Hamakua Mill Co.*, 15 Haw. 655."

Peabody v. Damon, 16 Haw. 451.
Washington & G. R. Co. v. Tobriner, 147 U. S. 571: 37 L. 284.

"Where the evidence is conflicting on the question as to whether a certain act of a partner was within the scope of his authority or was ratified by the other partner, this is also a question of fact for the determination of the court or jury, as the case may be."

Cassidy v. Saline County Bank, 14 Okl. 532: 78 Pac. 324.

IV.

THE AGREEMENT IS JOINT AND SEVERAL.

(a) It is the law of the case.

The Supreme Court of Hawaii (13 Haw. 360: Tr. p. 26) held:

"The agreement sued on (quoting from it) 'witnesseth: for and in consideration of the covenants, agreements and payments hereinafter named the parties of the first part for themselves individually and the said company collectively do hereby con-

stitute and accept the said parties of the second part as partners as hereinafter stated;' and then goes on to specify the details of the contract. As we construe this clause, it is in effect as though the language used had been, that for the consideration stated 'the parties of the first part do hereby, jointly and severally, make, with the parties of the second part, the following agreement of partnership.' The contract made in the opening clause by the parties of the first part is joint and several, and the contract there made is that the details of which are specified in the succeeding clauses. If paragraph 4 stood entirely by itself, it would probably be construed to mean that the members of 'the company' jointly were liable for the promise there set forth to give Harrison certain stock upon the happening of a certain contingency. The paragraph, however, cannot, we think, be read by itself; it must be read in connection with the opening sentence above quoted, and if so understood the result is the finding that the promise in question was a joint and several obligation on the part of the members of the company. This is the construction strongly contended for by the plaintiff himself."

When the case was next before the Supreme Court, after the verdict, it again held: "The promise contained in paragraph 4 sued on, was that 'the company' would deliver the stock. The parties jointly and severally undertook that they as partners of the company would do this."

Harrison v. Magoon et al., 14 Haw. 425-6, referred to Tr. p. 232.

And in the decision on the petition for rehearing it was held: "With possible exceptions not material in this case, the recovery must either be against all who are jointly liable or against each of the persons separately upon his several liability."

Harrison v. Magoon et al., 14 Haw. 532, referred to in Tr. p. 235.

(b) Such was the clear understanding of the parties.

The evidence, as to the relations of the parties when the agreement was made, shows that two agreements were first made

which bound the partnership jointly (Tr. p. 178, Ex. O, and Tr. p. 180, Ex. P); but when the plaintiff saw the powers-of-attorney and partnership articles (Tr. p. 98) he gave a further consideration (Tr. p. 99 and Tr. p. 183, Ex. R) to have the agreement changed, so that the partners of the original concern were each named and contracted, "for themselves individually and the said company collectively." He wished, after seeing the articles and powers, to have the partners in New Zealand bound to perform the contract individually should it afterwards develop, that the authority they represented themselves to have to bind the 'company collectively' should be successfully repudiated by some of their other partners; and as Cowart and Kirkpatrick were both lawyers (Tr. p. 113) the partners in New Zealand must have thoroughly understood the plaintiff's object in having such a change made, and their representations, that they individually owned stock if made liable therefor under the contract, shows it (Tr. pp. 121-2). It was the evident intent of all parties, that the obligation of the members of the original Hagey Company should be joint and several, and the language used can bear only one construction.

"It is true that in case of ambiguity in contracts, as well as statutes, courts will lean towards the presumed intention of the parties or the legislature, and will so construe such contracts or statute as to effectuate such intention; but where the language is clear and explicit there is no call for construction and this principle does not apply."

Caldron v. Atlas Steamship Co., 170 U. S. 280: 42 L. 1033, 1036.

(c) Such is the uniform construction put upon the word "individually" by the Courts.

"JOINT AND SEVERAL: Said of obligations in which all the obligees are to be held either collectively or as individuals."

Anderson's Dictionary of Law, 573.

"In some of the cases referred to the word 'each' is used, and in some the word 'severally;' and it is argued that the word in-

dividually, as used here, is in no sense equivalent to either of those words, and that there is no several liability. The word individually means separately, and this again means singly. Again, the word 'severally' means separately. To separate is to disunite, to divide, to disconnect, to sever. Things which are equal to the same thing are equal to each other."

Meisser v. Thompson, 9 Ill. App. 370.

"An individual is one entity, one distinct being, a single one, and when spoken of the human kind means one man or one woman. To individualize is to single out from the species."

People v. Doty, 80 N. Y. 225, 228.

"Where a husband and wife jointly undertake an employment each contributing labor and skill, it will be considered as the husband's business; and the profits therein are not the individual earnings of the wife, within the meaning of Rev. St. Sec. 2343, which provides that such earnings, except those accruing from labor performed for her husband, or in his employ, shall be her separate property."

Emerson Talcott Co. v. Knapp, 90 Wis. 34: 62 N. W. 945.

"It is said in some of the cases upon this subject that chancery can not interfere to compel the trustee to make a distribution of the fund in his hands, contrary to the express terms of the deed, but that when there is a fair opportunity to introduce construction, that the court will compel a distribution to all the residue of creditors not expressly provided for, if by the terms of the deed they are not expressly excluded. * * *

"Assignment which does not provide for payment of all debts of the assignor before the residuum is to be paid back to him is void. And the term 'individual debts' used by him in making the assignment can not be held to mean all his debts where the evidence shows that he had other than individual debts."

Goddard v. Hapgood and Trustees, 25 Vt. 351: 60 Am. Dec. 272.

"The bill alleges that each party was to pay his own individual expenses. * * * It was manifestly intended to

apply to private or family expenses, not connected with the business of the partnership."

Withers v. Withers, 8 Pet. (U. S.) 355.

"By the 7th section of the general Act relative to manufacturing incorporations (3 Rev. Stat. 222, 2nd Ed.), the stockholders are made individually liable for the debts of the corporations, to the extent of their respective shares of stock.

"Under that section it has been held by the Supreme Court that the liability is several and not joint."

Bank of Poughkeepsie v. Ibbotson, 24 Wend (N. Y.) 473, and 5 Hill 461.

Mann v. Pentz, 2 Sandf. Ch. (N. Y.) 255, 270.

"The word 'individually' in the 6th section of the Act relates to the personal liability of the members of the corporation as contradistinguished from their liability in their corporate capacity."

Sewall v. Allen, 6 Wend. (N. Y.) 335, 347.

"In an Indian treaty providing for the assignment of lands to families and individuals it was held that the word individual meant a person not a member of the family."

Summers v. Spybuck, 1 Kan. 294.

"V. S. Sec. 582-584 requiring every savings bank and trust company to pay a state tax upon the average amount of its deposits after deducting therefrom individual deposits in excess of $1500 each, and providing that no other tax shall be assessed on such deposits, except on individual deposits exceeding $1500, do not prevent the assessment of municipal taxes on the excess over $1500 of an trust fund held by a bank or trust company as trustee. * * *

"We think the word 'individual' was not used to distinguish between ordinary bank deposits and funds held upon special trust, but to resolve the aggregate as previously made up into its several holdings, as a basis for exempting $1500 each."

Montpelier Sav. Bank & Trust Co. et al. v. City of Montpelier, 73 Vt. 364: 50 Atl. 1117, 1118.

See also on this point:

Buckmaster v. McElroy, 20 Neb. 557: 57 Am. Rep. 843.
Perkins v. Smith, 116 N. Y. 441.

(d) Some cases hold that when the members of a copartnership contract in their individual names as members of the firm this alone makes the contract joint and several. Yet in the contract at bar, in addition to being separately named and described as partners, each individually undertakes to perform the contract.

"Where a contract expressly sets forth that it is made by 'H. N. L. and S. J. A., doing business under the firm name of L. & A.' as parties of the first part, it is their joint and several contract."

Forst v. Leonard, 112 Ala. 296: 20 So. 587.

"A contract running in the name of 'R. W. H. and J. F. K. of the firm of H. & K.' was signed in the firm name. Held to be the contract of the individual members of the firm."

Helliker v. Francesco, 65 Mo. 598.

"A person who covenants in his own name is personally bound, though he state it to be of a representative character."

Steele v. McElroy, 33 Tenn. (1 Sneed) 341.

So also where parties of one part contract for themselves and their heirs, the contract is joint and several.

"Where in a building contract, 'the parties of the first part herewith promise and agree for themselves, their heirs, executors, administrators, to pay,' etc., they are individually liable, though the contract recite that it is 'by and between the trustees and building committee,' of a church and the party of the second part."

Sandyskowski v. Lark et al., 108 Mich. 500: 66 N. W. 371.

And even where parties agree "to become partners" it is held that the agreement is joint and several as between themselves.

"Where seven parties agree to enter into a partnership at a future day the language being, 'they have agreed to become

partners' " it was held one could sue four others who broke the contract.

"I do not perceive why the contract might not be regarded as a contract both joint and several; a contract by each party with all the others to enter into a partnership with all the others; also a contract between each one, with each or more of the others, that he will go into partnership with all the others. That would seem to be the effect. The interests of the parties seem to require it to be so regarded."

Goldsmith v. Sachs, 17 Fed. 726.

V.

ABLES WAS LIABLE FOR BREACH OF THE AGREEMENT. AN AGREEMENT EXECUTED BY ONE OR MORE PARTNERS, ON BEHALF OF THE FIRM, WITHOUT AUTHORITY, MAKES THOSE EXECUTING IT LIABLE FOR ITS BREACH.

(a) Ables was liable for breach of the agreement.

In the decision appealed from the Court held the question, whether the agreement was joint, or joint and several, still, "open for consideration," and says: "Courts sometimes classify agreements between several persons as 'incomplete' if not signed by all who are named in them. This is on the theory of an implied term that all are severally bound in case only of all signing. In looking at the present agreement we reach the same conclusion by applying the theory of an implied term and by looking at the words used and the intended object. * * * 'In order to constitute a separate liability only, in those cases where several persons contract together for the performance of a particular act, the intention must be made plainly apparent by express words. This intention is to be gathered from a careful consideration of the whole tenor and general intent of the contract, and not from any particular words of severalty contained in it.' 2 Chit. Cont. 11 Am. Ed. 1354. An agreement purporting to be made between several parties that they jointly and severally agree upon being partners with each other is not

binding upon any one of them unless all execute or subsequently ratify the agreement."

Harrison v. Mugoon et al., 16 Haw. 339: Tr. pp. 235-6.

The above citation from 2 Chit. Cont. 11 Am. Ed. 1354, as used in the decision, apparently refers to the interpretation of contracts as to whether they are joint and several, or joint only, while as used by Chitty it referred to the interpretation of a contract as to whether the liability was several only, or joint and several, as with the context it reads: "If two or more persons, who have joined together in a contract 'covenant severally' or become 'severally bound,' it is (in the absence of express words implying a joint liability) the same as if each of the covenantors had executed a separate deed on the same paper. A joint action cannot, consequently, be maintained against the parties to such a contract, but each must be sued separately upon the separate contract made by each. But in order to constitute a separate liability only, in those cases where several persons contract together for the performance of a particular act, the intention must be made plainly apparent by express words," &c.

2 Chitty on Contracts, (11 American Edition) 1354.

Although there is some obscurity as to what the Court decided in its opinion last quoted from, when we petitioned for rehearing on the ground that the court had overlooked the fact that although the contract was joint, yet a recovery could be had against Ables, Chief Justice Frear in his opinion on rehearing declares: "This ground is based upon a misapprehension of the view that the court took in its recent decision and which is set forth, clearly as it seems to us, on pages 338 and 339 (Tr. pp. 235-6) *ante*. That decision was based on the ground that the contract sued upon was incomplete, whether it was joint and several or only joint in form. Among other things the court said, on page 339 (Tr. p. 236): 'An agreement purporting to be made between several parties that they jointly and severally agree upon being partners with each other is not binding upon any of them unless all execute or subsequently ratify the agreement.'"

Apparently this makes it clear that the court has held that whether the contract be joint or joint and several, in either case no recovery as to Ables can be had since the contract was incomplete as neither the powers-of-attorney nor the partnership agreement authorized its execution. As the court says: "This is on the theory of an implied term that all are severally bound in case only of all signing." (16 Haw. 339: Tr. p. 235.)

This, we submit, is erroneous. The law is as follows:

(1) If an agreement is in form joint, and is executed by a portion only of the parties named in it—where those who executed did not undertake to bind those who did not do so along with themselves—the rule is:

"Where a bond, a deed, or other written instrument is executed by a portion only of those named in the body of the instrument as parties, the question whether those who have executed it are bound, depends upon the circumstances under which the instrument was delivered, and these may be proved by parol. But it rests upon the party who has signed and delivered the instrument, to establish that the delivery was intended to be in escrow."

Chouteau v. Suydam, 21 N. Y. 180.

See also to like effect:

Pawling v. U. S., 4 Cranch (U. S.) 219: 2 L. 601.
Ward v. Winslow, 4 Pick. (Mass.) 518, 520.
Mattoon v. Barnes, 112 Mass. 463.
Van Norman v. Barbeau, 54 Minn. 388: 55 N. W. 1112.
Ward v. Chum, 18 Gratt. (Va.) 801.
State v. Potter, 63 Mo. 212: 21 Am. Rep. 440.
Brittain v. Work, 13 Neb. 347: 14 N. W. 421.
Carter v. Moulton, 51 Kan. 9: 32 Pac. 633.

And if those who executed the agreement, in the manner last described, afterwards act upon it knowing it has not been executed by the others they are bound, and cannot maintain that they considered it an escrow after they so acted upon it.

Adams v. Bean, 13 Mass. 137.
Ward v. Winslow, ubi supra.

(2) If the agreement is in form joint and several and is executed by a portion only of the parties named in it—where those who executed did not undertake to bind those who did not do so along with themselves—the rule is:

"The signer of a joint and several bond cannot deny its binding obligation, even where it appears on its face to be drawn for the signature of others, and they are not annexed, unless he declared at the time that he would not be bound without such signatures were obtained."

Los Angeles v. Mellus, 59 Cal. 444.

See also to like effect:

Parker v. Bradley et al., 2 Hill (N. Y.) 584.
Cutter v. Whittemore, 10 Mass. 442.
Warring v. Williams, 8 Pick. (Mass.) 322.

Thus it appears that if on the face of the contract all are to be merely "severally bound," according to the citation from Chitty, *ubi supra,* it is "the same as if each of the covenantors had executed a separate deed on the same paper." And a joint action could not be maintained against them. If on its face they were to be jointly and severally bound, as we contend is the case in the agreement at bar—leaving out of consideration that each signed for himself and as agent for the others—each upon signing it would be bound unconditionally whether the others signed or not, "unless he declared at the time that he would not be bound without such signatures were obtained." *(Los Angeles v. Mellus, ubi supra.)* While if on its face the contract were joint only, it would rest upon those who "signed and delivered the instrument, to establish that the delivery was intended to be in escrow." *(Chouteau v. Suydam, ubi supra.)*

The authorities are, however, uniform that if an instrument is complete on its face, as is the agreement in the case at bar, it cannot be delivered to a grantee in escrow.

"A bond cannot be delivered to one of the obligees as an escrow."

Moss v. Riddle, 5 Cranch (U. S.) 351: 3 L. 123.
Miller v. Fletcher, 27 Gratt. (Va.) 403: 21 Am. Rep. 356.
Ryan v. Cooke, 172 Ill. 309: 50 N. E. 213.
11 Am. & Eng. Ency. of Law, (2nd Ed.,) 337, note 4 and cases there cited.

There is no evidence that after the agreement was signed, in its present form, that Ables, or any party to it, expected it to be executed by any other person, or to be submitted to the parties who signed it by attorney for approval, before it should be delivered as complete and acted upon. Moore had refused to sign it—with Ables' knowledge—when it was executed by his partners (Tr. pp. 65, 141). Ables received one of the several copies executed, as a complete contract, in its present form (Tr. pp. 57-8, 146); and, in pursuance of it, he sent the plaintiff at Sydney, a few days after its execution, the medicines and subscription of the original Hagey partnership to the Tasmania partnership (Tr. p. 62 and Tr. p. 168, Ex. I). He accepted the sheep and run as the consideration of the agreement, and sold them on October 10th, 1897, (Tr. pp. 66-7,) before the agreement could possibly have been submitted to the partners at Honolulu and their assent made known to those at Auckland. It was never contended at the trial that any of the partners in New Zealand made the agreement, subject to the approval of those at Honolulu; and the fact that they each signed for the partnership collectively, while the names of those at Honolulu were signed by attorney, showed that it was intended to be delivered and acted on before being submitted at Honolulu, as in the latter case it would have been sent to Honolulu for execution by the parties there.

Whether the agreement be joint and several, or joint, in either case, where a number of co-obligors apparently execute a bond or other contract, and it afterwards transpires as a matter of law that some of them are not bound, this will not relieve the others from their liability—even when each does not undertake to bind all—if the facts, which relieve those not liable, were known to their co-obligors when the latter signed.

"Upon a bail bond entered into by 'J. W.' who had been arrested on mesne process, 'as principal, and A. W., wife of said J. W. and G. D. as sureties,' the wife is not liable, but the other surety is. * * *

"The defendant Doane executed the bond with his principal and co-surety, and the co-surety is described in the bond as the wife of the principal. Thus he was informed of the facts, and is liable."

Yale v. Wheelock, 109 Mass. 502.

See also to like effect:

Allin v. Shadburne, 1 Dana (Ky.) 68: 25 Am. Dec. 121.
Pepper v. State, 22 Ind. 399.

(Other cases on this point, where an agent, without authority, to bind his principal makes himself personally liable, and where a partner, without authority to bind the firm, endeavors to bind it, are cited under the next sub-head.)

There is evidence to show that when Ables executed the agreement for himself "individually and the said company collectively," he was informed as to all matters of fact in connection with his own authority and that of those signing with him, as he knew of the powers of attorney held by Cowart and Kirkpatrick from Magoon and Emerson (Tr. p. 45), which were in exactly the same language as his power from McStocker (Tr. p. 158, Ex. B, and Tr. p. 168, Ex. J); and in his letter to McStocker of October 29th, 1897, (Tr. p. 162, Ex. E,) he says, "it is very fortunate for you, Magoon and others that I have been here," while on November 26th, 1897, (Tr. p. 196, Ex. 4,) he writes, "if you and Magoon think so don't hesitate to cancel my power of Att'y;" thus showing he was familiar with Magoon's relations to Cowart and Kirkpatrick, while Magoon knew the relation of himself to McStocker.

The Court also held in the original opinion (16 Haw. 339: Tr. p. 236): "An agreement purporting to be made between several parties that they jointly and severally agree upon being partners with each other is not binding upon any of them unless all execute or subsequently ratify the agreement."

The agreement at bar is not one of this kind, or merely a case of eleven persons jointly and severally agreeing to be partners —although in such a case if the agreement were signed by less than all, those of them who signed would be bound jointly if it were delivered unconditionally by them as complete in its partially signed condition, and if the word *"severally"* meant anything those that signed, by so doing, would deliver it unconditionally as to whether the others signed or not. It is a case of nine persons, who being partners, put in a joint consideration, agreeing jointly and severally, and each for himself and on behalf of the others, as parties of one part, with two others, who each put in a separate consideration, as parties of the other part, to form a second partnership.

In the former case, *if such an agreement were ever made—whatever it might mean*—each would agree for himself only and all the other partners jointly, and the partner sueing the joint obligors for breach thereof, would be sueing for the breach of an obligation he had himself with the others undertaken to perform,—that is he would be sueing the partnership of which he was a member—this he could not do at law, but he could sue one or more, who had undertaken, individually, that certain of the others would be bound, for damages, for failure of the others to be so bound; although the agreement would not be binding on their principals and thus incomplete so far as they were concerned. So, in the latter case either of the two partners can sue the other nine, or any of them, for breach of their obligation, as he is not one of them; and especially can he sue any of them, when each has undertaken individually that all the nine collectively will perform that obligation, and some of the nine fail to do so,—that is he can sue, at law, one or more of his partners upon an undertaking between him and them, as individuals, for breach thereof. *(Harrison v. Magoon,* 13 Haw. 361: Tr. p. 20.)

And in contracts where each agrees with all the others, and also with those of the others who stand in a certain position, if they are signed unconditionally, irrespective of delivery, those who sign are bound whether the others sign or not.

"A contract whereby the signers agree each with all the

others, and each with those who are or may become liable as indorsers on the paper of H. Co. to protect such indorsers in proportion to each stockholder's holding, being a several contract, it is no defense for one who signed it unconditionally, that others did so on condition that all the persons named in it should sign."

Taylor v. Matteson, 86 Wis. 113: 56 N. W. 829.

If the agreement at bar did not make the plaintiff a partner of all the defendants, it at least made him a tenant in common with them and a partner of those who personally signed it; and the latter class of defendants are estopped to deny, that what they sold him is what they undertook to buy back, because they misnamed it at the sale, as by the very terms of the agreement they were to give the value of £2000 in "exchange for the portion * * * taken by him." They cannot sell it to him as an interest in a partnership and afterwards say it is not what they sold because it turns out to be a tenancy in common.

"Although a new member cannot be admitted into a partnership without the consent of all parties, yet a person who has obtained a share in the concern can, after the partnership has expired, maintain a suit in chancery for his share of the profits."

Mathewson v. Clarke, 6 How. (U. S.) 122: 12 L. 370.

"No third person can be admitted into a partnership once formed without the concurrence of all the original members. One attempted to be admitted otherwise, becomes only the partner of him who attempts to admit him."

Fearns v. Tiernan, 4 Rob. 367.

"Where a partner without the consent of his copartners assigned his interest in the firm it was held: "The assignee becomes tenant in common only, and as such may have a right to an account and the proportion of the profits."

Kingham v. Spurr, 7 Pick (Mass.) 235, 238.

See also to the same effect:

Noonan v. Nunan, 76 Cal. 44.

Merrick v. Brainard, 38 Barb. (N. Y.) 574.

Leader v. Plante, 95 Me. 343: 50 Atl. 53.
Marx v. Goodnough, 23 Ore. 545: 32 Pac. 511.

(b) An agreement executed by one or more partners on behalf of the firm without authority makes those executing it liable for its breach.

Where four persons acting for a partnership of nine, contract to form another partnership with two other persons, and exceed their authority, they are liable for breach of that contract in the same way they would be liable for breach of any contract they might make on behalf of the partnership of nine, in excess of their authority, which has not been ratified by the remaining five, and more especially are they so liable, when each of the four individually undertake that the whole nine will perform the contract. In neither case would the contract be binding on the partnership attempted to be bound, but in the one case equally with the other the partners who make the attempt are liable.

"Damages may be recovered upon an agreement by one of several partners to introduce a stranger into the firm, although the agreement be entered into without the knowledge of the firm.

"It is sufficient consideration for such an agreement, that the stranger will become a partner."

Tindall, C. J., in deciding the case cited, said: "Three objections have been made to the plaintiff's right to retain his verdict: First, that no action lies on the contract disclosed by the evidence in this cause; and that objection divides itself into two considerations,—one, that the plaintiff was aware of the fact that other persons were already in partnership with the defendant, consequently that the defendant could not, without the consent of such persons, force a stranger into the firm; and that the plaintiff cannot seek to enforce a contract which at the time he knew to be impossible. But this is no answer in the mouth of the defendant; for he should have secured the consent of his partners before he ventured to enter into such a contract; or is bound, at all events, to obtain it afterwards. * * *

"Bonsanquet, J.: 'I think this verdict ought not to be dis-

turbed. It is objected, that the contract is of such a nature that the defendant could not perform it without the consent of his partners; but that does not discharge the defendant from his contract, for he ought not to have engaged in it unless he had secured that consent.' "

McNeild v. Ried, 9 Bing. 68: 10 Mew's Digest 406.

See also:

The Swallow Fed. Case No. 13,665 (Olcott, 334.)
1 Bates on Partnership, Sec. 349 and note 2.

(c) In a suit against a partnership for breach of contract, judgment may be had against the partners who made the contract without authority, although the firm is not liable.

Statutes now exist in nearly all the States which authorize a plaintiff to bring action against any or all of joint and several defendants and to have judgment against one or more of several defendants as justice may require. "The true criterion now is, whether a separate action might have been maintained. If it could, a several or separate judgment is proper."

Harrington v. Highham, 15 Barb. (N. Y.) 524.

Where statutes in like terms to those described above do not exist, there are statutes in most, if not all, of the states and territories, which the courts enforce to like effect.

11 Ency. Pl. & Pr. 854 and cases cited in note 4.

The principle stated in this sub-head is recognized in *Dowling v. National Exchange Bank of Boston,* 145 U. S. 512: 36 L. 795, and the right to recover judgments against one of several defendants is affirmed in *Sawin v. Kenny,* 93 U. S. 289: 23 L. 926; *Atlantic, &c., R. Co. v. Laird,* 164 U. S. 393, and *Allen v. Clayton,* 11 Fed. 73.

Other cases under the statutes just referred to state the law as follows:

"After the dissolution of a copartnership one of the partners, without authority, indorsed in the copartnership name a note payable to the firm, and delivered it to the plaintiff, who advanced his money on the credit of the indorsement. In a suit

brought against both partners on the indorsement, it was held: 1st—That a several judgment could properly be rendered under the statute against the defendant who made the indorsement.

2nd—*That this defendant was estopped from denying that the legal title to the note passed by the indorsement to the plaintiff.*

* * *

"It was the intent of the statute to apply to all actions founded on contracts the same rule, with regard to recovery against a part of the defendants, which prevails at common law in the case of actions founded on torts."

Dean v. Savage, 28 Conn. 359.

"A partner who executes in the firm name a contract not within the scope of the partnership business is bound thereby, although the firm is not liable thereupon.

"In an action upon contract against two defendants jointly, where one only is found liable, no amendment of the declaration is necessary before entering judgment against such defendant separately, as authorized by Pub. St. c. 171, sec. 5."

Taft v. Church, 162 Mass. 527: 39 N. E. 283.

See also to same effect:

Link v. Allen, 48 Tenn. (1 Heisk.) 319.
Clafin v. Butterly, 2 Abb. Pr. 446: 5 Duer (N. Y.) 327.
Marks v. Bard, 1 Abb. Pr. 63: 8 Howard Pr. 151.
Stedeker v. Bernard, 102 N. Y. 327.
Smith v. Straub, 41 Kan. 7: 20 Pac. 516.
Roberts v. People, 55 Mich. 367: 21 N. W. 319.
Moore v. Otis, 18 Mo. 118.
Roggenkamp v. Hargreaves, 39 Neb. 540.
Bailey Loan Co. v. Hall, 110 Cal. 490.
Kingland & Douglas M'f'g. Co. v. Mitchell, (Tex. Civ. App,) 36 N. W. 757.
Ah Lep v. Gong Choy and Tong Wing, 13 Oregon 205: 9 Pac. 483.
4 Am. & Eng. Ency. of Law, (2nd Ed.,) 635, note 7 and cases cited at the end of this note on page 636.

Where more partners than one, without authority, contract to bind the firm, they are liable for breach of the contract if the firm is not bound, and in a suit against the firm judgment may be had against the partners making the contract.

"Here the plaintiff sued the three defendants, alleging that they were partners. The proof was that the contract declared on was made by two of the defendants, but was not within the scope of the partnership, and hence no cause of action was proved against the third defendant. * * * The appellants' contention proceeds upon the erroneous idea that the action was not against the individuals composing the firm, but against the firm.

"Held that judgment was properly rendered against two."

Keigher v. Dowler, 47 Minn. 540: 50 N. W. 823.

Where two members, on behalf of the firm agreed, without authority, to submit a matter to arbitration, it was held: "A recovery may be had upon such an award, against the partners consenting to the submission, on a complaint against all the members of the firm, alleging a joint liability."

Harrington v. Highham, ubi supra.

See also to the same effect:

Third Nat. Bank of Sedalia v. Fults et al., 115 Mo. App. 42: 90 N. W. 755.

"The liability of one partner, or acts and contracts done and made by his copartners, without his actual knowledge or assent, is a question of agency."

Irwin v. Williar, ubi supra; Dowling v. Nat. Bank, ubi supra.

The authorities are uniform that where an agent, without authority, attempts to bind a principal, he is also personally liable for breach of the contract, if he uses apt words to bind himself.

1 Am. & Eng. Ency. of Law, 1120, et seq.
Story on Agency, 316, Sec. 265.

Hastings v. Lovering, 2 Pick. (Mass.) 214: 13 Am. Dec. 420.

Wilder v. Cowles, 100 Mass. 487.

Bell v. Teague, 85 Ala. 211: 3 So. 861.

Hull v. Brown, 35 Wis. 654.

Hegeman v. Johnson, 35 Barb. (N. Y.) 200.

Mathews v. Jenkins, 80 Va. 463.

Hinsdale v. Partridge, 14 Vt. 547.

Roberts v. Button, 14 Vt. 195.

Cruse v. Jones, 71 Tenn. (3 Lea) 66.

Taylor v. Shelton, 30 Conn. 122.

Hewitt v. Roudebush, 24 La. Ann. 254.

Meech v. Smith, 7 Wend. (N. Y.) 315.

Farmers Co-operative Trust Co. v. Floyd, 47 Ohio St. 525: 26 N. E. 110: 21 Am. St. Rep. 846: 12 L. R. A. 346.

Lewis v. Clarkin, 18 Cal. 399.

Hall v. Crandall, 29 Cal. 567: 89 Am. Dec. 64.

Seaver v. Colburn, 10 Cush. (Mass.) 324.

Also where more than one agent attempt, without authority to bind their principals, the authorities are uniform that the agents are personally liable for breach of the contract if they use apt words to bind themselves.

"Where, in a building contract, 'the parties of the first part herewith promise and agree for themselves, their heirs, executors, administrators, to pay,' &c., they are individually liable, though the contract recites that it is, 'by and between the trustees and building committee,' of a church and the part of the second part."

Landykowski v. Lark et al., 108 Mich. 500: 66 N. W. 371.

To same effect see:

Fredenhall v. Taylor, 23 Wis. 538: 99 Am. Dec. 203.

Henderson v. Martin, 19 Ark. 477: 70 Am. Dec. 606.

Rowland v. Phalen, 14 N. Y. Super Ct. (L Bosw.) 43.

Steele v. McElroy, 33 Tenn. (1 Sneed.) 341.

(d) A mistake of law does not relieve from liability.

When two or more partners are liable for breach of contract made by them, without authority, on behalf of the firm, the argument that each may have thought the other partner had authority to bind the firm does not state a ground for relieving them, as a mistake of law would not relieve them from liability, nor yet a mistake of fact not known to or induced by the plaintiff.

"What one party to a contract understands or believes is not to govern its construction, unless such understanding or belief was induced by the conduct or declarations of the other party."

Bank of Metropolis v. Kennedy, 17 Wall (U. S.) 19: 21 L. 544.

20 Am. & Eng. Ency. of Law (2nd Ed.) 813, 815.

Furthermore a partner, who with others, attempts to bind the firm, without authority, is estopped from denying the authority, which by his conduct he represents to exist; it was his duty to ascertain there was such authority before the contract was made.

McNeild v. Ried, 9 Bing. 86; *Dean v. Savage,* 28 Conn. 359, *ubi supra.*

22 Am. & Eng. Ency. of Law (2nd Ed) 55 et seq.

(e) Under the statutes of Hawaii, when a suit is brought for breach of a contract by a partnership, and it develops at the trial that some of the partners made the contract without authority to bind the firm, judgment may be recovered against the partners making the contract without authority, and this is especially true, when the partners contracting, agree for themselves individually and the firm collectively.

The Civil Laws of Hawaii, 1897, Sec. 1222 (Revised Laws of 1905, Sec. 1741,) reads: "It shall be necessary to join as defendants in civil actions, all the joint and several, or joint makers of promissory notes, or drawers of drafts, bills of exchange, or orders, or joint and several obligors, lessees, or parties of the first or second part to covenants, agreements and con-

tracts, in suing for non-payment, non-acceptance, or non-fulfilment thereof, but it shall in no case be necessary to serve all the joint parties sued with process."

It was either the intention of the legislature, when this section was passed, to change the common law rule, that joint and several obligors must either be all sued jointly or each alone severally, and to permit judgment to be recovered against any number of them that might be liable, in all cases where "a separate action might have been maintained," *(Harrington v. Higham, ubi supra)* or it was their intention to make all joint and several contracts practically joint by obliging a plaintiff to recover against all or none according to the common law rule which "has been changed by statute in most, if not all, of the states." (11 Ency. Pl. & Pr. 854, *ubi supra.)*

Furthermore, the law of Hawaii allowing amendments, is exceptionally liberal: "Whenever a plaintiff in an action shall have mistaken the form of action suited to his claim, the court or judge, on motion, shall permit amendments to be made *on such terms as it shall adjudge reasonable; and the court* or judge *may, in furtherance of justice and on the like terms,* at the trial or on appeal, or at any other stage, before or *after judgment, allow any petition* or pleading or process or proceeding *to be amended by* adding or *striking out the name of any party,* or by correcting a mistake in the name of a party or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not substantially change the claim or defense, by conforming the pleadings or the proceedings to the facts proved."

Revised Laws of Hawaii, 1905, Sec. 1738.

When the Court, on demurrer in the case at bar, held, "it necessary for the plaintiff to join as defendants all of the parties of the first part to the agreement sued on in the first count," (13 Haw. 339, 361: Tr. p. 27), it must have considered it the intention of the legislature, when it made it mandatory to join all joint and several defendants, that the court should non-suit the plaintiff as to such of the defendants as were not liable and

allow him to proceed against the others. This was evidently the view taken by the trial court, and also by the defendants, as the motion for non-suit was made as to each of the four defendants on separate grounds and granted by the Court as to each of them, *by name,* without ordering a non-suit as to all the defendants, the Court also saying, "the plaintiff cannot maintain this action as against the defendants, who have been served or who have appeared in this action." (Tr. p. 148.) To argue that it was not sufficient for the plaintiff to except to the non-suit, but that it was his duty to move to have the pleadings amended by adding the names of Ables, Magoon, McStocker or Emerson, after non-suit as to them, in order that he might allege error in not being permitted to proceed against either of them separately after the non-suit had been granted as to some only of the other defendants as well as the one whose name he wished to add, is to say that an exception to a ruling of the Court is not sufficient to support an appeal; but that a counter motion must be made to reverse the action of the Court excepted to.

The Supreme Court of Hawaii also recognized, that this is the practice, in the case at bar, when it held (14 Haw. 532), "the recovery must be either against all who are jointly liable or against each of the persons separately upon his several liability." And again (16 Haw. 337: Tr. p. 235): "By declaring against all, however, he took the chances of being able to show that they had all executed the agreement, and was liable to 'be non-suited at the trial if he fail in proving a joint contract.' (1 Ch. on Pl. 51), unless this was an agreement binding upon the defendants severally as well as jointly." Finally, in deciding the petition for rehearing (16 Haw. 586: Tr. p. 262), the court ruled that the plaintiff was not non-suited as to all the defendants because it had overlooked the argument that even though the contract, "was joint a recovery could be had against some of the parties thereto if not against all," as, "the view that the court took * * * was based on the ground that the contract sued upon was incomplete."

The principle, that where more than one defendant is sued, the plaintiff may recover as to some only of them, has been

affirmed in Hawaiian cases. In *Dowsett v. Jones,* 9 Haw. 543, 547, as the trial court had given judgment against all the defendants when it should have been against only one, a new trial was ordered with leave to amend by striking out the name of the husband, especially in view "of the fact that the statute of limitations had become a bar to a new action," although the action was, "upon a joint promise and indebtedness of the husband and wife." The court thus recognized that the common law rule, that the plaintiff should be " 'non-suited at the trial if he fail in proving a joint contract' (1 Ch. on Pl. 51)" (16 Haw. 337: Tr. p. 235) had been changed by statute in Hawaii. The principle is recognized in *Testa v. Kahahawai,* 12 Haw. 254, 257.

In Texas where there is no statute authorizing judgment against one or more of several defendants, and it is not mandatory, but merely permissive to join defendants at the option of the plaintiff, it was held:

"In a suit against A., and B., on a draft, which on its face appears to have been executed by both of them as partners *in the firm name,* but which was executed by A., only, judgment may be rendered against A., and in favor of B., when it is shown under plea of *non est factum,* that the draft was not executed by B., or by his authority.

"The rigid system of the common law regarding forms of action which required the plaintiff to be non-suited if he sued two persons on a joint contract, and one of them showed himself not to be liable, has no application here."

Willis v. Morrison, 44 Texas 27.

See to same effect:

Moore v. Williams, 31 Tex. Civ. App. 287: 72 S. W. 223.
Congdon v. Monroe, 51 Texas 109.
Kingsland & Douglas Mfg. Co. v. Mitchell, (Tex. Civ. App.), 36 S. W. 757.

There are also numerous cases where defendants have been sued jointly, or jointly and severally, as partners or otherwise, where the liability is not alleged to be created by some on behalf

of all, in which judgment has been given against a portion of the defendants and in favor of a portion of them. See cases cited:

11 Ency. Pl. & Pr. 854 note 1.

This question is discussed in:

Bibb v. Allen, 149 U. S. 481, 505: 37 L. 819, 828.

(f) Ables was duly notified of the plaintiff's dissatisfaction with the condition of the partnership business in Tasmania.

The six months in which the plaintiff could exercise his option was to commence when the plaintiff devoted his time to the business in Tasmania, and departed from New Zealand for that purpose (Tr. pp. 127-8 and 159, Ex. C). It cannot be said he did this until January 17th, 1898. If the business in Tasmania had proved successful the defendants certainly would not have consented to plaintiff drawing salary as manager thereof for any period prior to January 17th, 1898.

If the six months commenced on January 17th, 1898, then, as Ables was served with the summons from New Zealand on July 23rd, 1898, (Tr. pp. 58, 87, 147, 221 and 171, Ex. M,) in the nature of things the summons must have been in transit before July 17th, 1898, when the six months ended.

The notice of dissatisfaction and the demand for stock of the value of £2000 the plaintiff made on Kirkpatrick on March 10th, 1898, (Tr. pp. 107-8, 139 and 188, Ex. T,) at Sydney, would also bind Ables provided the partnership is liable, *(Harrison v. Magoon,* 14 Haw. 425-6, 530-1); and even if the partnership collectively is not liable Ables, by contracting for himself individually and the partnership collectively, is estopped to deny, that notice to one of the partners bound, is notice to him.

"If an individual hold himself out to the world as a partner in a concern, he is liable as such, though he have no interest in it."

Benedict et al. v. Davis, 2 McLean (U. S.) 347: 3 Fed. Cases, Case 1293.

McGowan v. American Pressed Tan Bark Co., 121 U. S. 575, 591-2: 30 L. 1027, 1032-3.

22 Am. & Eng. Ency. of Law, 55, et seq., and cases cited in notes.

McNeild v. Ried and *Dean v. Savage, ubi supra.*

Furthermore, as the plaintiff did his "best to find" Ables, when he returned to Auckland after notifying Kirkpatrick of his dissatisfaction on March 10th, 1898, and was unable to do so; (Tr. p. 109)—since Ables had gone to Australia without even giving his address to his partners at Honolulu (Tr. pp. 54 and 196-7, Ex. 4)—and as he brought his suit in New Zealand before he knew Ables' whereabouts, or the addresses of the other defendants (Tr. pp. 109-110), and as Ables was served with the Summons on July 23rd, 1898, (Tr. pp. 58, 87, 147, 221 and 171, Ex. M,) within a reasonable time thereafter, Ables by not making his address, or even the part of the world he was in, known to the plaintiff, waived notice of dissatisfaction until the plaintiff by "the exercise of diligence in making inquiry for the residence," of Ables was able to find him.

"Judge Story enumerates the excuses of a general nature for failure to give notice * * * 5. The utter impracticability of giving notice, by reason of the party entitled thereto having absconded, or having no fixed place of residence, or his place of residence or business being unknown, and incapable of being ascertained upon reasonable inquiries."

Wade on the Law of Notice, 432, Sec. 976.

"All that is required of the holder * * * is the exercise of diligence in making inquiry for the residence or place of business of the party to be notified."

Idem 436, Sec. 990.

See to same effect:

4 Am. & Eng. Ency. of Law (2nd Ed.) 436.

It cannot well be said that the summons in the New Zealand suit was not both a notice and demand by the plaintiff (Tr. p. 171, Ex. M), nor that what would constitute waiver of notice

of dishonor of a negotiable instrument—concerning which the law of notice is most strict—would not constitute notice in connection with other contracts.

It was also sufficient to allege that demand was made and notice given on March 10th, 1898, as the delay in notifying Ables was through no fault of the plaintiff; but because Ables did not leave his address at Auckland, and the facts "excusing such delay may be proved under the averment that notice was given."

14 Ency. Pl. & Pr. 1070.

Firth v. Thrush, 8 B. & C. 387: 15 E. C. L. 242.

VI.

IF THE PLAINTIFF IS NOT ENTITLED TO RECOVER FOR BREACH OF CONTRACT, HE SHOULD BE ALLOWED TO AMEND HIS DECLARATION AND RECOVER ON A QUANTUM VALEBANT, AS IT WAS THE LAW OF THE CASE THAT HE COULD RECOVER AGAINST THE DEFENDANTS SEVERALLY AS WELL AS JOINTLY FOR BREACH OF CLAUSE 4; AND IF THAT HAS BEEN CHANGED HE SHOULD BE ALLOWED TO ADAPT HIS PLEADINGS TO THE CHANGE OF LAW, BECAUSE OF SURPRISE IN THAT HE COULD NOT ANTICIPATE SUCH CHANGE. HE SHOULD ALSO BE PERMITTED TO AMEND BECAUSE THE STATUTE OF LIMITATIONS HAS BECOME A BAR TO A NEW ACTION SINCE THE COMMENCEMENT OF THIS ACTION.

(a) The plaintiff is entitled to a new trial and to amend if there were no error in the judgment below.

The rule of pleading that a declaration on an express contract may be amended by adding a count on the implied contract to return the consideration in case of failure to prove the express contract, is elementary.

1 Ency. Pl. & Pr. 564-5, 583-4 and note 1.
Turnow v. Hockstadter, 7 Hun. (N. Y.) 80.
Copeland v. Johnson Mfg. Co., (Supreme Court), 3 N. Y. Supp. 42.

Cox v. McLaughlin, 76 Cal. 60.
Perrin v. Keen, 19 Me. 355.
Evans v. Warner, 21 Hun. (N. Y.) 574.
Rodrigue v. Currier, 15 S. & R. (Pa.) 81.
Bryce v. Massey, 35 S. C. 127: 14 S. E. 768.
Heath v. Whidden, 29 Me. 108.
Kuhn v. Brownfield, 34 W. Va. 252: 12 S. E. 519.
Dance v. McClure, 39 Vt. 196.
Bruns v. Schreiber, 48 Minn. 366.
Chicago Elc. R. Co. v. Bills, 118 Ind. 221: 20 N. E. 770.
Burnham v. Spooner, 10 N. H. 165.
Libley v. Young, 26 S. Car. 415.
Stephens v. Thompson, 28 Vt. 77.
Pierce v. Wood, 23 N. H. 519.
Stevenson v. Mudgett, 10 N. H. 336.

(A digest of the above cases on this point is made in the petition for rehearing; Tr. pp. 247-8.)

Such an amendment may be made although a new action on the same facts would be barred by the statute of limitations, as the facts set forth in the original declaration would be the same as those relied on for recovery under the amendment, and thus no new cause of action would be introduced.

1 Ency. Pl. & Pr. 621 and note 3.

Smith v. Missouri Pac. R. Co., 56 Fed. Rep. 458.
Smith v. Palmer, 6 Cush. (Mass.) 303.
Case v. Blood, 71 Iowa 632.
Telffner v. Dillard, 70 Texas 140.
Western Union Tel. Co. v. Brown, 62 Texas 36.
Abbott v. Chambers, 55 Mich. 410.
Baltimore Elc. R. Co. v. Gibson, 41 Ohio St. 145.
Ely v. Early, 94 N. Car. 1.

Myers v. Kirt, 68 Iowa 124.
Smith v. Bellows, 77 Pa. St. 441.
Bisley v. Pheonix, 2 Hun. (N. Y.) 349.
Thompson v. Swearengin, 48 Texas 555.
Hastings v. Kellogg, (Tex. Civ. App.) 24 S. W. 846.
Recton v. Alexander, 27 Texas 659.
Man de Hear v. Van Domseler, 56 Iowa 671.
Ball v. Clafin, 5 Peck. (Miss.) 303.
Wilson v. Wideham, 51 Me. 366.
Heath v. Whidden, 24 Me. 383.
Spencer v. Howe, 26 Conn. 200.
Boyd v. Bartlett, 36 Vt. 9.
Coxe v. Tilgham, 1 Whart. (Pa.) 282.
Hunt v. Taylor, 25 Ohio St. 620.
Harris v. Wadsworth, 3 Johns (N. Y.) 257.

(The cases last cited, with others, are digested on this point in the petition for rehearing; Tr. pp. 248-9, 251.)

Furthermore Revised Laws of Hawaii, 1905, Sec. 1738, (quoted *supra* V, e) is exceptionally liberal in its terms and provides: "Whenever a plaintiff in an action shall have mistaken the form of action suited to his claim * * * the court * * * may * * * at the trial or on appeal, or any other stage, before or *after judgment,* allow any petition * * * to be amended * * * by inserting other allegations material to the case, when the amendment does not substantially change the claim or defense, by conforming the pleadings * * * to the facts proved."

It is the practice under statutes like this, in a proper case, after judgment, to allow an amendment, and vacate the judgment "in order to give the opposite party an opportunity to controvert the new allegations."

1 Ency. Pl. & Pr. 605-6-7, and cases cited.

The Supreme Court of Hawaii held in the opinion on the petition for rehearing, under review, (16 Haw. 488: Tr. p. 264): "The difficulty is that no error has been found in the judgment

below, and in the absence of error that judgment cannot be reversed merely for the purpose of allowing an amendment and making it effective."

On this point there seems to be some difference of opinion, as where the facts, that have been both pleaded and proved, would justify a recovery by the appellant, although to avoid a variance the pleadings may require amendment—as they might so require in the case at bar if this Court were to hold the plaintiff could recover for a quantum valebant alone—if justice require it, this Court will order a new trial, even after judgment against the appellant, with leave to him to amend. Whether or not such action constitutes the reversal of a judgment in which "no error has been found" is thus a purely academic question.

When judgment had been given for the plaintiff in an action to quiet title, it was held, that "if justice appeared to require it," an amendment by the defendant might be allowed.

Jones v. Meehan, 175 U. S. 1, 28: 44 L. 49, 60.

"When the facts of the case show the plaintiff to have an equitable title to relief, this Court, while it may be unable to afford such relief upon the case made by the bill, may remand the case to the court below for an amendment of the pleadings, and such further proceedings as may be just."

Wiggins Ferry Co. v. Ohio & M. R. Co., 142 U. S. 396: 35 L. 1055.

In *Balcom v. Woodruff,* 7 Barb. (N. Y.) 14, it is stated: "The general rule is that a party who has not applied for an amendment until after he has been non-suited, is too late to ask for a new trial in addition to an amendment. But where a plaintiff has been non-suited at the circuit, on the ground that his declaration contained no count adapted to the nature of the case, it appearing that the defendant had not been misled; that the cause had been once tried without any objection having been made; that the statute of limitations had attached; and that such relief would be manifestly in furtherance of justice, the court allowed the plaintiff to amend his declaration *nunc*

pro tunc, and set aside the non-suit, on the payment of costs." And after remarking that the plaintiff had not moved to amend at the trial but had insisted he was entitled to judgment against the defendant liable, if both defendants could not be held, on page 17 *Idem* the court says: "We think therefore, that the non-suit was rightly granted, and we have no power to set it aside on the ground of an erroneous decision of the judge at the circuit." And again on 18 *Idem*, "In this case we may give the plaintiff the benefit of a presumption that he was taken by *surprise*, inasmuch as the case had been once tried without any such objection having been taken."

In *Holmes v. Seely*, 17 Wend. (N. Y.) 75, after the trial court had granted a non-suit on the ground of a variance, a new trial was ordered, although the court held the non-suit was not erroneous, but intimated, it would have been preferable, "to permit the plaintiff to take a verdict notwithstanding a misdescription of the estate or premises claimed, and leave him to apply to the court for permission to amend so as to conform to the proof."

In *Meadow Company v. Christ Church*, 15 N. J. L. 52, a non-suit was set aside on appeal and a new trial ordered although the court held: "I think the Chief Justice did right in non-suiting the plaintiff." And again: "The mistake or error is in the original declaration, and non-suit was, therefore, properly granted."

Other cases on this point are:

Nelson v. Ayres, 11 N. J. L. 62.
Trask v. Duval, 24 Fed. Case No. 14,143, (4 Wash. U. S. 97).

(b) The judgment of non-suit, now under review, was, however, erroneous under the law of the case, whether the agreement was binding on none of the defendants unless it was binding on all, or not.

The agreement had been held joint and several in the decision after argument on demurrer (13 Haw. 360: Tr. p. 26), as an

instruction to the trial court, and this was affirmed after verdict (14 Haw. 425-6), while the court held in deciding upon the petition for rehearing after verdict, that the plaintiff could recover either "against all who are jointly liable or against each of the persons separately," and that the only thing which prevented Ables from being liable, when Magoon, McStocker and Emerson were not bound, was that: "The notice and demand relied upon was shown to have been made upon Kirkpatrick alone." Hence when, at the succeeding trial, now under review, the plaintiff proved the necessary notice to Ables, the judge was bound by *The Law of the Case* to find Ables severally liable, even if the defendants were not jointly so, and, therefore, to grant a nonsuit as to Ables was erroneous.

"When a case has been once decided by this Court on appeal and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the *law of the case,* and must carry it into execution, according to the mandate. That Court cannot vary it or examine it for any other purpose than execution; or *give any other or further relief;* or review it, *even for apparent error,* upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded."

Re Sanford Fork & Tool Company et al., 160 U. S. 247: 40 L. 414, 416.

Sibbard v. United States, 12 Pet. (U. S.) 488, 492: 9 L. 1167, an equity case, and *Texas & P. R. Co. v. Anderson,* 149 U. S. 237, 37 L. 717, a common law case, are cited in support of the last quotation.

"Inferior tribunals are bound by the conclusions of the supreme court, and cannot treat them as dicta on the theory that the questions determined were not properly raised by the record, and were not necessary to the determination of the case."

Gibson v. Chouteau, 7 Mo. App. 1.

The Supreme Court of Hawaii was also bound to hold that Ables was severally liable, if the defendants were not jointly so,

by the law of the case, the notice to him having been proved. And even if their last decision that the contract was incomplete was correct in law, it was erroneous as contrary to the law of the case and the plaintiff is entitled to a new trial.

"As to the first question, we deem it sufficient to say that the Supreme Court of Florida has distinctly decided that in the case of this Company, as well as the other, the statutory authority was complete. The point was directly made by the pleadings and as directly passed on by the court. Although the bill in the case was finally dismissed because it was not proved that any of the state bonds had been sold, the decision was in no just sense *dictum. It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter.*"

Florida Cent. R. Co. v. Schutte, 103 U. S. (13 Otto) 118: 26 L. 327.

Other cases on this point are:,

U. S. v. The Nuestra Senora De Regla, 108 U. S. 92: 27 L. 662, 666.

Kennicott et al., 94 U. S. 498: 24 L. 260.

Illinois v. Illinois C. R. Co., 184 U. S. 77, 91, 92: 46 L. 440, 447.

"Where the Supreme Court, in reversing a judgment and remanding the cause for a new trial, consider and pass upon a point of law, with a view to the new trial for the purposes of which it is important, the ruling upon such point, though not essential to the decision, becomes the law of the case in all its future stages."

Table Mt. Tunnel Co. v. Stranahan, 21 Cal. 548.

Adams et al. v. Fisher et al., 75 Texas, 657: 6 S. W. 772.

Hawley v. Smith, 45 Ind. 183.

Hiatt v. Brooks, 17 Neb. 33: 22 N. W. 73.

Sharpstein v. Friedlander, 63 Cal. 78.
Bridgeforth v. Gray, 39 Miss. 136.
Alexander v. Worthington, 5 Md. 471.
Rohrbach v. Germania Fire Ins. Co., 62 N. Y. 47, 58.
Louisville R. R. Co. v. County Act, 33 Tenn. (1 Sneed.)

637: 62 Am. Dec. 424.

"A construction put upon a written contract by the appellate court will be adhered to as the law of the case in the same litigation."

3 Am. Dig. Century Ed. Column 2363, citing numerous cases.

Even if this court should hold that the contract was incomplete, the plaintiff is entitled to an opportunity to amend and declare for a *quantum valebant,* as, at the time of trial, he was justified in believing that the Supreme Court of Hawaii was bound by the law of the case, and he could not then foresee that it might be changed by this Court, which was only given such jurisdiction on March 3rd, 1905. The situation thus comes within that described as *surprise in Balcom v. Woodruff, ubi supra,* as the plaintiff had no reasonable ground before the trial to anticipate that such an amendment would be necessary, and the assurance of the *then* law of the case that it was not so.

As to what constitutes surprise see:

McGuire v. Drew, 83 Cal. 225.
Gidionsen v. Union Depot R. Co., 129 Mo. 401.
United Security Life Ins. & Trust Co. v. Ott, (N. J. E.) 26 Atl. 923.
Simpkins v. Simpkins, 14 Mont. 386: 36 Pac. 759.
Bennett v. Jackson, 34 W. Va. 62: 11 S. E. 734.
27 Am. & Eng. Ency. of Law, (2nd Ed.) 549, 550.

It is true that there is no statute in Hawaii, as there is in many states, making surprise a ground for relief against a judgment; but equitable defenses are allowed in the practice there, even when set up by the plaintiff to rebut presumptions for the defense.

"This court has in many instances inclined to admit equitable principles into law actions, and on this ground alone might well admit proof in an action to recover the purchase money, to rebut the *prima facie* evidence of the statement in the deed."

Morris v. Petero, 4 Haw. 23, 29.

Surprise was considered as a ground for new trial which was applied for by the plaintiff in *Kaimiola et al. v. Beni et al.*, 5 Haw. 294.

Other cases of equitable defenses are:

Heeia Sugar Co. v. McKeague, 5 Haw. 101.
May v. Haalelea, 2 Haw. 191.
Kamohai v. Kahele, 3 Haw. 530.

See cases cited Revised Laws of Hawaii note to Sec. 1736.

As the facts proven show a good cause of action against at least some of the defendants the plaintiff's right to amend should receive special consideration as the statute of limitations has become a bar to a new action.

Balcom v. Woodruff, ubi supra.
Dowsett v. Jones, ubi supra.
Sherman v. Harrison, 7 Haw. 664.
1 Ency. Pl. & Pr. 518-9.

VII.

THE DECISION OF THE SUPREME COURT OF HAWAII TO ONLY CONSIDER THE PLAINTIFF'S EXCEPTIONS TO THE DISMISSAL OF THE MOTION FOR NEW TRIAL, WHICH THE TRIAL COURT REFUSED TO HEAR ON ITS MERITS, IS NOT A GROUND FOR THIS COURT TO REFUSE TO CONSIDER THE ERRORS NOW ASSIGNED.

(a) The judgment should be reversed because the trial court did not consider it had power to order a new trial.

The motion for new trial was dismissed not because there had been no errors of law at the trial, but because the trial court

considered it had no power to order a new trial, as it refused to consider the motion on the grounds, "(1) that a motion for a new trial was improper in the case of a decision and judgment of non-suit, and (2) that no notice of a motion for a new trial was given by plaintiff at the time of the decision and judgment of non-suit." (Tr. pp. 208, 221). The Supreme Court of Hawaii decided that the trial court erred in not passing upon the merits of the motion for new trial (16 Haw. 170: Tr. pp. 224, 231); and in this decision no error has been alleged. In such a case this court will consider the question that the trial court refused to pass upon, and reverse the judgment, if necessary, when due exceptions have been taken to the trial court's refusal to consider the matter, as in the case at bar (Tr. p. 221).

"The allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed, and the result cannot be made the subject of review by writ of error *(Henderson v. Moore,* 9 U. S. 5 Cranch, 11: 3 L. 22; *Newcomb v. Wood,* 97 U. S. 581, 24 L. 1085), but in the case at bar the district court excluded the affidavits, and, in passing upon the motion, did not exercise any discretion in respect of the matters stated therein. Due exception was taken and the question of admissibility thereby preserved. * * * These affidavits were within the rule, and being material, their exclusion constitutes reversible error. * * * We should, therefore, be compelled to reverse the judgment because the affidavits were not received and considered by the court."

Mattox v. United States, 146 U. S. 140: 36 L. 917.

(b) The granting of a motion of non-suit is not a matter within discretion of the trial court, and if the trial court's action in so doing is properly brought by Bill of Exceptions before the court whose decisions this court reviews, this court will review the action of the court hearing the Bill of Exceptions, although in hearing such Bill of Exceptions the intermediate court professed to be reviewing a motion for a new trial.

After the Supreme Court of Hawaii decided that the trial court erred in not passing upon the merits of the motion for

new trial (Tr. pp. 224, 230: 16 Haw. 170), it decided it could only consider the trial court's refusal to consider the motion for a new trial (Tr. p. 231: 16 Haw. 332-3-4), and then passed upon the merits of the judgment of non-suit, alleging that it was reviewing the trial court's action in passing upon the motion for new trial, as the merits of the judgment of non-suit was the only thing that the record showed was before the trial court on the motion for a new trial. In fact the trial court neither passed upon the judgment of non-suit nor any other errors of law alleged when the motion for new trial was presented. Thus, as the trial court did not review the judgment of non-suit on the motion for new trial, the Supreme Court of Hawaii in reviewing the judgment of non-suit did not review the action of the trial court in reviewing that judgment on the motion for new trial, but actually reviewed the judgment of non-suit as given at the trial, whatever it said it was reviewing. In any event, the granting of an order of non-suit is not a matter within the discretion of the trial court, and, consequently, its action thereon is reviewable by this court if the matter has been properly presented, by a Bill of Exceptions authenticated by the trial judge, to the court whose action this court reviews, and considered by that court, and this is so even though that court were *ostensibly* only considering the dismissal of a motion for new trial.

"The actual decision of a Federal question in denying a rehearing is sufficient to give jurisdiction on writ of error to a state court from the Supreme Court of the United States, although an attempt to raise that question for the first time on motion for rehearing is usually too late.'

Missouri K. & T. R. Co. v. Elliott, 184 U. S. 530: 46 L. 673.

And where the record shows that a question, the decision of which is not a matter of discretion, has been presented to, *and passed upon by,* the courts below, even if it has been presented to the trial court on motion for new trial alone, this court will review the decision on such a question.

Chicago B. & Q. R. Co. v. Chicago, 166 U. S. 226: 41 L. 979.

Meyer v. Richmond, 172 U. S. 82: 43 L. 374.

Missouri K. & T. R. Co. v. Haber, 169 U. S. 613: 42 L. 878.

The following case is in point as to the right of this court to review a decision reviewing the decision of a motion for new trial which reviews the judgment of the trial court.

"A preliminary question is presented by the defendants in error: They insist that no Bill of Exceptions was taken at the trial, and that, therefore, no rulings of the trial court are before us for consideration, citing as authority the case of *Kerr v. Clampitt,* 95 U. S. 188: 24 L. 493. In that case, as in this, after the trial a statement of the errors alleged, upon which a motion for a new trial was based, was prepared and filed; but, although signed by counsel, it was held by this court to be not the equivalent of a Bill of Exceptions, and to be available only for the purpose expressed, to-wit, the motion for a new trial. There was in that case no stipulation that the statement should be treated as a Bill of Exceptions, or be available for other purposes than that of a new trial. It was not authenticated by the trial judge. *Lacking that authentication,* it was adjudged available only for the purpose named; and that it did not bring into the record, for review in this court, the questions presented. In this case the proceedings on the trial are embodied in a statement prepared like that for the purpose of a motion for a new trial; but, in addition, it is authenticated by the trial judge as a correct statement of the proceedings. Further than that, at the trial a Bill of Exceptions was prepared in respect to the rulings of the court on instructions, signed by the trial judge and filed at the time, which Bill of Exceptions was incorporated in the statement. So that we have a separate and perfect Bill of Exceptions as to the rulings of the court on the matter of instructions; and a statement of all the proceedings in the trial, approved by counsel and authenticated by the trial judge. This proceeding was authorized by the statutes of Montana, and must be adjudged as sufficient for the purposes of review here."

Montana Ry. Co. v. Warren, 137 U. S. 348: 34 L. 681.

It has never been contended, in the case at bar, that the excep-

tions were not saved at the trial or the Bill of Exceptions not duly authenticated by the judge; but the only irregularity alleged was that the bill was not presented within twenty days after final judgment, as required by statute, although it is admitted it was duly presented within twenty days after the disposal of the motion for new trial and the further time allowed by the court.

(c) According to the statutes of Hawaii the judgment of the trial court did not become final, so that the twenty days within which the Bill of Exceptions had to be presented to the trial judge would commence to run, until the motion for new trial was disposed of, and the Supreme Court of Hawaii erred in not considering all the exceptions presented by the bill.

The judgment of non-suit was made November 9th, 1903, (Tr. p. 220), the motion for new trial filed November 14th, 1903, (Tr. pp. 208, 220),—within the ten days allowed by law (vide decision 16 Haw. 170: Tr. p. 222, in this part of which no error is alleged)—and dismissed January 16th, 1904, (Tr. pp. 208, 221), and the stipulation extending the time (Tr. p. 209) in which to present the Bill of Exceptions was filed January 20th, 1904, within the twenty days allowed by Session Laws 1903, c. 32, s. 18 (Revised Laws of Hawaii, 1905, sec. 1864), which reads: "Such exceptions * * * may at any time within twenty days after final judgment, or such further time as may be allowed by the judge, be incorporated in a Bill of Exceptions and presented to the judge." (Revised Laws, Sec. 1864, was amended March 29th, 1905, but the amendment does not affect this case). The transcript was completed July 25th, 1904, (Tr. p. 149,) and the Bill of Exceptions presented on August 6th, 1904, (Tr. p. 222,) within the twenty days allowed by the stipulation (Tr. p. 209). Hence, if the twenty days did not commence to run until the motion for new trial was disposed of then the Bill of Exceptions was presented in time to have not only the exceptions to the dismissal of the motion for new trial reviewed, but all the exceptions taken during the trial so reviewed, and the judgment which says, "that

the only exception in the bill which was presented within the time required by law is that which was taken to the dismissal of the motion for a new trial," (16 Haw. 334: Tr. p. 232,) is erroneous.

The statute on this subject in S. L. 1898, Act. 40, Sec. 2, and in the Civil Laws of 1897, Sec. 1438, was as follows: "A party may allege exceptions to any such opinion, direction, instruction, ruling, or order, and the same being reduced to writing in a summary mode, and presented to the judge during the term or within ten days thereafter; or, in case of proceedings in vacation as of the term, within ten days after the opinion, direction, instruction, ruling or order objected to, and being found conformable to truth, shall be allowed and signed by the judge; but if the judge shall refuse to allow and sign such exceptions, the truth of the allegations therein contained, may, nevertheless, be established before the Supreme Court; and the exceptions allowed by it; provided, that further time may be allowed by the judge in his discretion."

This statute was amended April 22nd, 1903, (S. L. 1903, c. 32, s. 18) so that it read as printed in Revised Laws of Hawaii, 1905, Sec. 1864, and in that form the law applied when the judgment of the trial court was rendered on November 9th, 1903, (Tr. p. 220,) and the motion for new trial dismissed January 16th, 1904, (Tr. pp. 208, 221). The changes made by the amendment of April 22nd, 1903, were, that the exceptions to the "opinion * * * or order," had to be "presented to the judge within ten days after the opinion * * * or order objected to," in any event, whether during term or otherwise, while the following sentence was added, "provided further, that if such exceptions are reported by a stenographer or entered in the judge's minutes, they need not be written out or presented to or allowed or signed by the judge within such time, but may be written out at the request of the party taking such exceptions, and allowed and signed by the judge and filed with the clerk at any time, and any such exceptions, whether so reduced to writing in a summary mode and allowed and signed by the judge, or so written out whether allowed or signed or not,

or filed with the clerk or not, may at any time within twenty days after final judgment, or such further time as may be allowed by the judge be incorporated in a bill of exceptions and presented to the judge, and, being found conformable to the truth, shall be allowed and signed by him, and if he shall refuse to allow and sign the same, the truth of the allegations therein contained, may, nevertheless, be established before the supreme court and the exceptions allowed by it."

The Supreme Court of Hawaii seems to have overlooked the last quoted sentence of the statute, which was added in 1903, as, having held that an exception would lie to the ruling on the motion for new trial, "whenever it was made," it goes on to say (16 Haw. 172: Tr. p. 225): "Under the circumstances the reasonable view would seem to be to consider the motion for a new trial as a 'proceeding,' and not as a part of the 'trial,' and the judgment in that proceeding as the decision therein, rather than the judgment entered previously after the trial and before the motion for a new trial was filed." And again (16 Haw. 334: Tr. p. 232): "The motion for a new trial, although properly made, as held in the previous decision *(Ib.* 176) did not suspend the judgment or operate as an extension of time within which to incorporate such exceptions in a bill or present the same to a judge."

The statute as it stood before the amendment of 1903 permitted the appellant to take his exceptions to any "opinion, direction, instruction, ruling or order," whether it were a final judgment or not (with certain reservations concerning interlocutory judgments not pertinent to this inquiry) to the supreme court, if it were done within ten days after the term, or, if in vacation, within ten days after the "opinion * * * or order;" and the sentence added in 1903, if it meant anything, was intended to give him the right after "final judgment"—or after the last exercise of jurisdiction by the trial court in the matter—to take his exceptions to all the "opinions * * * or orders," rendered prior to that "final judgment," in one bill of exceptions to the supreme court, without taking from him the right to have his exceptions to any of those "opinions * * * or orders," presented and allowed within ten days thereafter without wait-

ing for "final judgment." Between April 22nd, 1903, when the amendment was made allowing the Bill of Exceptions to be presented after "final judgment," and January 16th, 1904, there was no decision of the Supreme Court of Hawaii as to, at what stage of the trial such "final judgment" occurred. Hence the matter was without Hawaiian precedent when the question at bar arose.

According to the decision appealed from there were, under the statute, two "final judgments," as distinguished from "opinions * * * or orders," in the case at bar, as exceptions to, "opinions * * * or orders," had to be presented within ten days, and those to "final judgments," within twenty days, and that decision says (16 Haw. 172: Tr. p. 225), "the bill of exceptions, in so far as the exception to the dismissal of the motion for a new trial is concerned, was made up and presented to the judge within the time limited, for the extension of time was obtained within *twenty days* after the decision upon that motion." And again (16 Haw. 334: Tr. p. 232): "We are of the opinion that the only exception in the bill which was presented within the time required by law is that which was taken to the dismissal of the motion for a new trial. The remaining exceptions, which were taken to rulings during the trial, were not 'incorporated in the bill of exceptions and presented to the judge' within twenty days after final judgment."

To have two final judgments in one trial seems a contradiction in terms, and shows the fallacy of the reasoning in the decision appealed from.

There appears to be no precedent for the interpretation of the term "final judgment" in the decision at bar, as it was contrary to the evident intent of the statute as then amended, and to the settled interpretation heretofore put upon it by the courts, as the authorities appear to be uniform that where an appeal is given after "final judgment" as distinguished from other "opinions * * * or orders," not interlocutory, and a motion for a new trial is made: "There is no final disposition of the case, and no final judgment rendered from which an appeal can be taken until it is disposed of."

2 Ency. Pl. & Pr. 137.

This point was passed upon by this court in *Kingham & Co. v. Western Mfg. Co.*, 170 U. S. 675: 42 L. 1192. In that case the statute provided that, "no appeal or writ of error by which any order, judgment or decree may be reviewed * * * shall be taken or sued out except within six months after the entry of the order, judgment or decree sought to be reviewed;" while another clause gave the court power "to review final decisions," and it was held that the latter clause provided "an exception to the general rule, and while the language" of the former clause referred to "the entry of the order, judgment or decree, yet the meaning must be confined to final orders, judgments or decrees." Consequently the court reversed the order of the Circuit Court of Appeals which dismissed an appeal from a judgment which had been taken within six months after the motion for new trial had been disposed of but not within six months after the judgment had been entered.

In the case at bar the statute gives the appellant twenty days after *"final judgment"* and not merely a certain period *"after the entry"* of judgment, and unless *"final judgment"* meant when the case passed out of the jurisdiction of the trial court by the decision of a motion for new trial or the like, the amendment of 1903 would be practically meaningless as the statute as it stood before that time allowed exceptions to be taken from all other kinds of judgments.

Other cases on this point are:

Brockett v. Brockett, 2 How. (U. S.) 238: 11 L. 244.

Aspen M. S. S. Co. v. Billings, 150 U. S. 31: 37 L. 986.

Texas & Pac. Ry. Co. v. Murphy, 111 U. S. 488: 28 L. 492.

Northern Pacific R. Co. v. Holmes, 155 U. S. 137: 39 L. 99.

In *Tullis v. Lake Erie & W. R. Co.*, 105 Fed. 554, it is decided that where judgments do "not take final effect for the purposes of a writ of error * * * there is no good reason for saying that the time for settling a bill of exceptions, the

necessity for which could not be known sooner, had passed."

It is true in *Armijo v. Armijo*, 181 U. S. 558: 45 L. 1000, when the territorial court refused to consider a bill of exceptions, because it had not been authenticated by the stenographer or judge: "No compliance with the territorial law or with the rules of the court relating to the authentication of testimony" appearing by the record—this Court held: "This matter of practice in the courts of the territory is based upon local statutes and procedure and we are not disposed to review the decision of the supreme court in such a case." And again in *Sweeney v. Lomme*, 22 Wall. (U. S.) 208: 22 L. 727, when a provision in the Practice Code had been interpreted "differently by different state courts" it was held: "Without expressing any opinion of our own on the question, we hold that as it is one which arises under their own Code of Practice, we should, *in this conflict of authority*, adopt the ruling of the Supreme Court of Montana in the consideration of it."

But, in the case at bar, the court refused to consider the exceptions to the judgment taken at the trial, not because there was any failure to comply, "with the territorial law or with the rules of court," but did so contrary to the express language and unquestionable intent of the statute, concerning the interpretation of which there has never been any conflict of authority, and which can bare no two constructions.

(d) A writ of error is the proper method by which to review the judgment of the Supreme Court of Hawaii in the case at bar.

Kingham & Co. v. Western Mfg. Co., ubi supra.

Ex parte Baltimore & O. R. Co., 108 U. S. 566: 27 L. 812.

Ex parte Railway Co., 103 U. S. 894: 26 L. 461.

Ex parte Pennsylvania Co., 137 U. S. 451, 453: 34 L. 738.

Respectfully submitted,

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